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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

GESKE & SONS, INC.,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND JUDICIAL DISTRICT

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QUESTIONS PRESENTED

1. Whether federal law requires the Illinois courts to follow this Court's *Linn v. Plant Guard Workers* defamation standard which protects speech uttered during the course of "labor disputes," except for those publications and statements that are knowingly false or made in reckless disregard of the truth.

2. Whether this Court's articulation of a single standard of proof for libelous statements in *Linn v. Plant Guard Workers* for labor disputes, therein adopting by analogy the *New York Times v. Sullivan* standards of liability for statements made in reckless disregard for the truth or knowingly false, tolerates and does not preempt continuing state use of *per se* libel law standards that act to deprive a party of the right to protect its reputation and business when libeled during the course of a labor dispute.

LIST OF PARTIES

Petitioner Geske & Sons, Inc. is a closely-held, non-public corporation owned by Larry Geske and Leroy Geske. Geske has no parent companies, subsidiaries or affiliates.

The Respondents here include:

International Union of Operating Engineers, Local No. 150;

Chuck August, a business agent of International Union of Operating Engineers, Local No. 150, and

Chauffeurs, Teamsters and Helpers, Local Union No. 301.

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No. 93-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GESKE & SONS, INC.,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, NO. 150; CHUCK AUGUST, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND JUDICIAL DISTRICT

Petitioner Geske & Sons, Inc. ("Geske") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Second Judicial District.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District is unreported. The opinion of the Circuit Court of McHenry County, Illinois, is also unreported. These opinions and Orders are reproduced in the appendix at pages 1a and 11a, respectively.[1] The ruling of the United States District Court for the Northern District of Illinois is reprinted in the appendix at page 26a.

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[1] "_a" references are to the accompanying Appendix hereto. "Tr. Vol." references are to the volumes of the trial court transcript.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1992. A timely petition for rehearing was filed on December 1, 1992 and denied on January 5, 1993. A petition for leave to appeal to the Supreme Court of Illinois was filed on April 10, 1993. The Petition was denied on June 3, 1993. Justice Stevens granted Petitioner's motion for extension of time to file the Petition for Writ of Certiorari to this Court on August 10, 1993 (App. No. A-135), to and including October 1, 1993. This Court has jurisdiction to review the judgment of that court under 28 U.S.C. § 1257(3).

CONSTITUTION AND STATUTES INVOLVED

Article VI, Section 2 of the Constitution, provides:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 151 *et seq.*, is involved in this case.

29 U.S.C. § 152(9) provides:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment authorized in section 158(a)(3) of this title.

STATEMENT OF THE CASE

a. Procedural Background

Petitioner filed its state court action on September 5, 1991. It complained that Local 150's publication and use of "on Strike" language on picket signs was materially false and misleading both because none of Geske's employees were in fact on strike or were refusing to work and because Local 150 through the reasonable exercise of diligence, acted recklessly in disregard of the truth in making the statements. In addition, Local 150 untruthfully informed Geske customers that Geske was closed and that Geske's workers were "On Strike." These acts impaired Geske's operations and caused it damage. Nothing in the complaint requested an injunction to stop Local 150 from all picketing. The Complaint asked that Local 150 be restrained from recklessly publishing false statements.

Geske filed a motion for Temporary Restraining Order and for Preliminary Injunctive Relief, and argued that it could recover damages for trade libel upon proof of actual malice within the meaning of *New York Times v. Sullivan* and *Linn v. United Plant Guard Workers*, because agents of Local 150 and Local 150 had acted in reckless disregard of the truth when they also uttered

statements to Geske customers that Geske was closed, out of business, and that Local 150 represented Geske employees.

Geske successfully obtained a TRO from the Circuit Court of McHenry County. The following day, September 6, 1991, Local 150 filed a Verified Notice of Removal to the United States District Court for the Northern District of Illinois. The district court dismissed the case and remanded it back to state court. 30a.

The state trial court then received testimony in support of Preliminary Injunctive Relief. After hearing Geske's evidence, the state court found the tort of trade libel was not preempted by federal law under *Linn*. It then granted a directed finding to Local 150 for Geske's failure to establish within the high standards for injunctive relief, the Illinois corporate *per se* standard of financial disparagement required under *Vee See Constr. Co. v. Jensen & Halstead, Ltd.*, 79 Ill. App. 3d 1084, 1089, 399 N.E.2d 278 (1st Dist. 1979) ("*Vee See*"). 11a, 15a-16a.

On appeal, the Appellate Court of Illinois, Second Judicial District, also found that Geske's causes of action were not preempted by federal labor law. 5a. However, the appellate court rejected Geske's request that it apply the "standard of malice or reckless disregard for the truth" rule from *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58, 65 (1966), *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264 (1974) ("*Austin*"), and *Lowe Excavating Co. v. International Union of Operating Engrs., Local 150*, 180 Ill. App. 3d 39, 535 N.E.2d 1065 (2d Dist. 1989) ("*Lowe*"), *Ill. app. denied*, 126 Ill. 2d 560, 541 N.E.2d 1107 (1989), *cert. denied*, 110 S. Ct. 499, 107 L.Ed.2d 502 (1989), rather than *Vee See*. 6a-7a. The appellate court determined that the Illinois trade libel standards applied to the case and not *Linn*. It denied a timely petition for rehearing.

A timely motion for leave to appeal was filed with the Illinois Supreme Court. It was denied.

b. Factual Background

This case presents a question of significant statutory importance to employers nationwide: whether the libel law standard for labor law disputes prescribed by this Court in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), requiring proof that actionable statements were made in reckless disregard of the truth or knowingly false, is a uniform rule of federal law or may it be redefined by state courts and replaced with different standards of proof.

Geske is a small commercial asphalt paving and manufacturing contractor operating in Crystal Lake, Illinois with approximately twenty employees at the time the lawsuit was filed. Chuck August is a business agent of International Union of Operating Engineers Local 150 ("Local 150").

From August 19, 1991 to September 18, 1991, Local 150 picketed Geske with signs stating:

I.U.O.E. LOCAL 150
ON STRIKE
AGAINST
GESKE
FOR RECOGNITION
AS MAJORITY BARGAINING
REPRESENTATIVE OF
COMPANY'S OPERATING
ENGINEER EMPLOYEES

The words "ON STRIKE" against Geske were printed in eight inch high bold red lettering. In handwritten letters approximately 1-1/2 inches high in light red coloring, the remaining words "for recognition as majority bargaining representative of Company's operating engineer employees," were written.

During this picketing, the evidence shows that union business agents carried these signs and made appeals to Geske's employees, suppliers, and customers. Specifically, Local 150 stopped suppliers and customers and told them that Geske employees were striking

when none were. TR. Vol. I at 47; Tr. Vol. V at 233, 235.[2] Moreover, they told Geske customers attempting to enter Geske's driveway that Geske was "closed." Next, the union told Geske customers to purchase their supplies from Curran, a union competitor. These customers were told that Curran would give them credit and charge them less for asphalt, but Curran actually charged more per ton. TR. Vol. II at 56, 58-59.

Union business agents testified that they knew the words "on strike" would be understood to mean that concerted action was being taken by employees against their own employer. Tr. Vol. I at 47; Tr. Vol. VIII at 1110-1111.[3] Moreover, testimony showed that in 1989, Local 150 began using the "on strike" language embodied in this case because union and non-union workers did not honor Local 150's "prevailing wage" or "area standard" notices to the public. However, the union became successful in preventing workers from crossing its picket lines by using the new "on strike" signs. Tr. Vol. 2, 142-44. For example, truck drivers for Vulcan Materials Company, a thirty year supplier of aggregate material to Geske, refused to cross the "on strike" picket line. Tr. Vol. I at 73-74

Furthermore, Local 150 combined these misrepresentations with threats to Geske's customers, such as All American Asphalt Maintenance, that they would destroy their trucks, Tr. Vol. II at 153, and

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[2] Subsequent NLRB election proceedings, 33-RC-3769, established that only one Geske employee worked in the jurisdiction of the Operating Engineers Union. *See Foreign Car Center, Inc.*, 129 N.L.R.B. 319, 320 (1960) (a representation election requires more than one eligible person).

[3] Webster's Third New Unabridged Dictionary defines the word "Strike" as: "a work stoppage by a body of workers to enforce compliance with demands made on an employer." In Austin, 418 U.S. 283, the Court employed Webster's definition of "scab," to ascertain its meaning. Here, no "body of workers" engaged in "a work stoppage" against Geske. This definition is accepted throughout the caselaw. *See NLRB v. Illinois Bell Telephone Co.*, 189 F.2d 124 (7th Cir. 1951); *IBEW v. Bradley*, 147 Ill. App. 3d 193, 499 N.E.2d 577 (2d Dist. 1986) ("[w]hen a union prohibits its members from working for their employer--that is a strike.");*City of Rockford v. Local 413*, 240 N.E.2d 705 (Ill. App. 1968) ("cessation of work by employees").

lit cigarette lighters to prove their intent. Tr. Vol. II at 153, 157. Trucks were dangerously followed and drivers harassed by agents of Local 150. Tr. Vol. II at 74; Tr. Vol. V at 295, 333, 416; Tr. Vol. VII at 113, 127.

Geske plead that it had no strike or any dispute with its employees at all. Verified Complaint ¶¶ 26-27. All its employees reported to work and all its employees carried on their respective jobs. Complaint ¶¶ 26-27. In addition, Geske alleged that Local 150's statements falsely assailed Geske's financial position because it implied that Geske was out of business or was not financially a viable business entity. Complaint ¶ 26.

The complaint also alleged that: the union blocked ingress and egress at the entrance to Geske's facility, Complaint ¶ 19; the "On Strike" sign the union used was materially false and was knowingly made in reckless disregard for the truth, Complaint ¶ 20; at the entrance to Geske's facilities, the union climbed onto customers' trucks, congregated in a hostile fashion, and followed Geske's trucks, Complaint ¶ 23; the union told Geske's customers that Geske was "closed," "broke down," and "on Strike" when it knew these statements were false, Complaint ¶¶ 25-27; and that the union intended the acts listed above to interfere with Geske's business relations and advantage. Complaint ¶¶ 51, 57.

Hence, Geske alleged Local 150 had engaged in a combination of acts that injured Geske: it masqueraded as Geske workers, spoke untruthfully to Geske customers, and uttered to customers and suppliers that Geske's workers were "on strike" when none were.

C. Litigation Background

On the same day Geske filed its Complaint for Injunctive Relief, it filed a motion for Temporary Restraining Order that was heard by the state court. The motion was granted. In relevant part, the TRO restrained Local 150 from:

> (1) physically blocking ingress and egress of plaintiff's employees, customers, and suppliers to and from plaintiff's

> facility at 4020 Northwest Highway, Crystal Lake, Illinois; (2) threatening plaintiff's employees, customers and suppliers; (3) publishing false and misleading statements, oral or written, about Geske and Sons, Inc., to plaintiff's employees, customers, and suppliers and to the public at large, including, but not limited to placards, signs or statements stating that the employees of plaintiff are on strike; and (4) otherwise interfering with the contractual relationships between plaintiff and its customers and suppliers.

The next day, Local 150 removed the case from state court to the United States District Court for the Northern District of Illinois.

Local 150 asserted that Geske's Complaint alleged federal questions. The district court disagreed. 26a. First, the judge showed that Geske's Trade Libel, Tortious Interference with Contractual Relations, and Prospective Economic Advantage counts "are causes of actions available under Illinois common law." 27a. Furthermore, the district court ruled that Local 150's claim that the state causes were "preempted" were claims entitled to be addressed by the state court in the first instance: "[i]f so the state court can dismiss the complaint, either because of preemption or for failure to state a claim." 28a. Local 150 did not appeal this ruling to the Seventh Circuit.

Upon return of the case to state court, the state judge heard testimony in support of Geske's Motion for Preliminary Injunction. It found that the litigation was not preempted, 16a. The court also held that the standard of "libel per se where the plaintiff is a corporation," taken from *Vee See*, applied. There, the Illinois Appellate Court held that "[t]o state a cause of action for libel *per se* where the plaintiff is a corporation, the statements allegedly defaming the plaintiff in its trade or business must assail the corporation's financial position or business methods, or accuse it of fraud or mismanagement." *Vee See*, 399 N.E.2d at 281.

Consequently, the trial court found that "the sign, as indicated, does not fall within that definition of trade libel as set forth in the *Vee See* case...." 18a.[4]

On appeal, the Appellate Court of Illinois, Second Judicial District, held that "the *Vee See* standard was proper in this case because the plaintiff was a corporation." 7a. It rejected Geske's argument that the libel standard taken from *Lowe Excavating Co. v. International Union of Operating Engrs., Local 150*, 180 Ill. App. 3d 39, 535 N.E.2d 1065 (2d Dist. 1989), applied "because the trade libel in this case is in a 'labor context' as opposed to a traditional corporate context." 6a. It held that the *Lowe* court's statement that "'whether the defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard of the truth,'" was applicable to labor disputes was judicial *dicta*, 6a, that "*did not define a new standard* by which to judge a libel action brought by a corporation" 7a (emphasis added). It reaffirmed the trial court's holding that "libel, where the plaintiff is a corporation, is clear: the alleged defamation must assail the corporation's financial position, business methods, or accuse it of fraud or mismanagement." 7a.

Furthermore, the Appellate Court believed that the union held a "conditional privilege" to picket Geske, "protected by the NLRA." 9a. As such, the Appellate Court ruled that in trade libel labor dispute cases, "plaintiff must, then, establish that the defendant acted *with a desire to harm* which was unrelated to the interest that he was presumably seeking to protect." *Id* (emphasis added).

> The situation alleged here does not present an instance of "outsiders *intermeddling maliciously* in the contracts or affairs of other parties"....Additionally, we do not find sufficient evidence in the record of actual malice on the part of the defendants to vitiate their conditional privilege.

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[4] On the same day the circuit denied the motion for preliminary injunction, it allowed the filing of a Third Amended Complaint which is now being brought to issue. 23a. The libel law developed to support the denial of the Preliminary Injunction is at the heart of this Petition.

9a (emphasis added).

REASONS FOR GRANTING THE WRIT

I.

THE ACTUAL KNOWLEDGE OR RECKLESS DISREGARD FOR THE TRUTH STANDARD OF PROOF FOR TRADE LIBEL ARISING IN A "LABOR CONTEXT" WAS ESTABLISHED BY THIS COURT IN *LINN V. PLANT GUARD WORKERS* AND CONFIRMED IN *AUSTIN* TO BE A UNIFORM RULE THAT MUST BE FOLLOWED BY STATE COURT'S TO AVOID FEDERAL PREEMPTION.

The Appellate Court of Illinois ruled that *Lowe Excavating Co. v. Int'l Union of Operating Engrs., Local 150*, 180 Ill. App. 3d 39, 47-48 (2d Dist. 1989), was not the proper labor law trade libel standard to apply in Illinois. *Lowe* adopted the libel standards enunciated by this Court in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966). The appellate court below, however, chose to accept the elements of private corporate trade libel relied upon by another Illinois appellate court in 1979 in *Vee See Constr. Co. v. Jensen & Halstead, Ltd.*, 79 Ill. App. 3d 1084, 399 N.E.2d 278 (1st Dist. 1979). That case involved two corporate entities in which the court held that "the alleged defamation must assail the corporation's financial position, business methods, or accuse it of fraud or mismanagement." 7a.

However, the corporate trade libel standard should have no application to the situation at bar. A careful reading of the *Vee See* standards show that it applies exclusively to situations of libel *per se* in the *financial arena*: "[t]o state a cause of action for libel *per se* where the plaintiff is a corporation, the statements allegedly defaming the plaintiff in its trade or business must assail the

corporation's financial position or business methods, or accuse it of fraud or mismanagement." *Vee See*, 399 N.E.2d at 281.[5]

Federal labor law plainly preempts state libel *per se* standards. The Court has always understood that federal labor rights would be burdened by allowing *per se* libel standards in labor disputes and ruled in *Linn*, 383 U.S. at 58, 65, that *per se* standards are preempted because state laws cannot account for intangible rights established by federal labor law:

> As we have pointed out, certain language characteristic of labor disputes may be held actionable *per se* in some state courts. These categories of libel have developed without specific reference to labor controversies....We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specifie items of pecuniary loss, or whatever form of harm would be recognized by state tort law.

Linn, 383 U.S. at 65.

Therefore, to prevent interference "with effective administration of national labor policy," *Linn*, 383 U.S. at 64, this Court chose to adopt the free speech test from *New York Times v. Sullivan*, 376 U.S. 254 (1964), and specifically to apply its "malice" test to labor cases:

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[5] In a factually similar case, *Wolf Street Supermarkets, Inc. v. McPartland*, 108 A.D.2d 25, 487 N.Y.S.2d 442, 117 Lab. Cas. (CCH) 80,382 (App. Div. 1985), the court considered a tortious interference with business relations claim against union picketing and leafletting with false statements. The court adopted the *Linn* malice standard of proof and found that a corporation's reputation can be damaged by union activity. "It could have shown by direct testimony from persons in the community that the statements were understood by them to impeach the plaintiff's integrity or business methods causing them to shop elsewhere." *Id.* at 80,386. The court below rejected this same contention made by Geske. 7a.

> Construing the [Labor] Act to permit recovery of damages in a state cause of action *only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false* guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act.

Linn, 383 U.S. at 65 (emphasis added).

The *Lowe* court referred to the above passage in *Linn*, *Lowe*, 535 N.E.2d at 1071,[6] in adopting this test. Contrary to the court below, this adoptive position was not merely an inartful "comment" or legal "dicta" concerning the state of libel law in labor disputes as the appellate court suggested, 6a, but an absolutely correct statement of law. In fact, the appellate court's observation that "the case law pertaining to libel, where the plaintiff is a corporation, is clear," 7a, is itself directly contrary to the federally mandated balance achieved by this Court in *Linn* and *Austin*, *infra*.[7]

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[6] The appellate court stated in Lowe:

> "The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth. While truth or falsity is an important element in the tort of trade libel, it is certainly not the only issue to be considered. The issues of injury to reputation and defendant's mental state must also be considered."

[7] The appellate court stated that Geske asserted the *Lowe* standard as the correct legal standard "for the first time on appeal." 6a. Geske respectfully submits that the observation is not incorrect, but must still be allowed as the question raises an issue of subject matter jurisdiction. In Geske's very first motion to the trial court (Plaintiff's Motion for Temporary Restraining Order and Preliminary and Permanent Injunction, dated Sept. 5, 1991), it argued that "[t]he standard this appellate court must apply is whether Defendants, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard of its truth. *Lowe Excavating Co. ....*" Motion at 5. In Geske's opening brief on appeal, Geske argued "the trial court erred as a matter of law when it applied *Vee See* and failed to apply the standard of malice or reckless disregard for the truth set forth in the Second District opinion in *Lowe Excavating Co.....*Therefore the trial court should be reversed." Brief at 20, dated Feb. 24, 1992. *See also* Complaint ¶ 20.

Any difficulty the appellate court might have had in reconciling the traditional state trade libel elements with the *Linn* labor law requirement was settled by the Court in *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264 (1974) ("*Austin*"). There, a worker brought a libel action in state court against his union's publicly naming him and other workers "scabs." The plaintiff prevailed on a standard of malice that equated "malice" with the common law parlance of ill will and spite. *Austin*, 418 U.S. at 280-81. That, the Court ruled "reflects a fundamental misunderstanding of the Court's holding in *Linn*." *Id.*, 418 U.S. at 281.

The Court's decision completely occupies the field of labor libel. Clearly, the Court replaced these state standards by issuing the following affirmative statement concerning *Linn*:

> The Court therefore found it *necessary to impose substantive restrictions on the state libel laws* to be applied to defamatory statements in labor disputes so as to prevent "unwarranted intrusion upon free discussion envisioned by the Act." *Linn*, at 65, 86 S.Ct., at 644....Accordingly, we held that libel actions under state law were pre-empted by the federal labor laws to the extent that the State sought to make actionable defamatory statements *in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth.*

Austin, 418 U.S. at 272-73 (emphasis added).

> Of course, the appellate court also said that recovery would be permitted if the defamatory statements were shown to have been made with malice. But **the Court was obviously using "malice" in the special sense it was used in *New York Times* - as a shorthand expression of the 'knowledge of falsity or reckless disregard of the truth" standard.**

Austin, 418 U.S. at 281 (emphasis added).

Thus, the Illinois court's Order broke down when it applied the *per se* libel standard in the "corporate context" represented by *Vee See*, 6a, to the "labor dispute" arena where *Linn* had "*imposed*" application of the "malice/reckless disregard" standard of proof.[8] This conflict is not isolated. It is inherent in the divergent view taken by the states.

In *Amalgamated Ass'n of Street, Elec. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 2894, 296 (1971), this Court recognized that "disparities in remedies and administration could produce substantial conflict" where the "federal concern is pervasive and its regulation complex." Represented by the opinion below, the state courts have not developed the law uniformly. They have advanced in separate directions in response to the Court's directions. For example, in *Hotel & Restaurant Employees, Local 681 v. Anaheim Operating, Inc.*, 82 Cal. App.2d 337, 147 Cal. Rptr. 510 (Ct. App. 1978), the court recognized that the malice/reckless disregard of the truth test in labor dispute defamation cases was constitutionally required to prevent "50 different standards of propriety during an organizational campaign." This danger is avoided if the states apply *Linn* uniformly to labor disputes.

This is the majority position, where the term "labor dispute" is treated in the broadest sense. *See Tosti v. Ayik*, 386 Mass. 721, 437 N.E.2d 1062, 114 L.R.R.M. (BNA) 2558 (1982); *Henderson v. Teamsters, Local 313*, 90 Wash. 2d 666, 585 P.2d 147, 99 L.R.R.M. (BNA) 3472, 3474 (1978) ("the existence of malice is jurisdictional and must be established to avoid federal preemption"). In *Tosti*, the Massachusetts Supreme Judicial Court read *Linn* and *Austin* to mandate the *New York Times* standard in labor disputes. Moreover, because subject matter jurisdiction was at stake, the issue could be raised and considered any time. *Id.* at 2560.

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[8] At the time of *Vee See*, the Illinois courts had neither the reason nor the power to extend its trade libel ruling to labor organizations, as unincorporated organizations could not be sued in Illinois. *American Fed'n of Technical Engrs. v. LaJeunesse*, 63 Ill. 2d 263, 266-67 (1976).

After remand for trial, the *Tosti* court considered the verdict in light of the falsity involved and the damages awarded. *Tosti v. Ayik*, 394 Mass. 482, 476 N.E.2d 928, 108 Lab. Cas. (CCH) 77,638 (1985). Relying on *Linn* and *Austin*, 108 Lab. Cas. at 77,639, the court ruled that "state courts may grant relief in such defamation actions only if the defamatory statements were made with actual malice, as defined in *New York Times v. Sullivan* [citation omitted]." *See also Dale v. Ohio Civil Serv. Employees Ass'n*, 57 Ohio 3d 112, 567 N.E.2d 253, 136 L.R.R.M. (BNA) 2898, 2902 (1991) (common law rule modified by *Linn*; standard also applies to public sector labor disputes); *OCAW v. Sinclair Oil Corp.*, 748 P.2d 283, 128 L.R.R.M. (BNA) 2709, 2713 (Wy. 1987) (observing that the *Linn* Court "concluded that in the labor dispute context state libel remedies were available *only* if a plaintiff could demonstrate actual malice"); *CWA v. Archibeque*, 105 N.M. 635, 735 P.2d 1141, 125 L.R.R.M. (BNA) 2395 (1987) (same).

The appellate court below represents the contrary position. In addition, other courts have concluded that the *Linn* malice test was applicable in labor libel cases only "by analogy rather than by constitutional compulsion," *Caruso v. Teamsters, Local 690*, 33 Wash. App. 201, 653 P.2d 638, 111 L.R.R.M. (BNA) 2927 (1982) (damages awarded for "Don't Patronize" articles in union press), citing *Linn*, 383 U.S. at 65. In *Oetzman v. Ahrens*, 145 Wis. 2d, 560, 566, 427 N.W.2d 421, 424 (1988), a union official's grievance letter to management, led to a libel award of compensatory damages. The Wisconsin Supreme Court narrowly construed the meaning of "labor dispute" and ruled that "Linn's vitality is limited to issues of NLRB jurisdiction," and where union elections and strikes are in issue. 145 Wis. 2d at 566. "[W]hile *Linn* may be good precedent on issues concerning the extent of the NLRB's jurisdiction, it is of little value as a guide to substantive law." 145 Wis. 2d at 568.

Where a requirement of law is to show that a person "(a) knows that the statement is false and that it defames another, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them," the Restatement (Second) of Torts § 580B, comment i, places liability on the defendant when there is a high degree of awareness that the utterance is untrue:

> Reckless disregard is held not to be measured by whether a reasonable prudent person would have published the statement without more investigation. Reckless disregard is said to exist, however, when there is "a high degree of awareness of...probable falseness" of the statement, or there are "serious doubts as to [its] truth." Availability of sufficient time and opportunity to investigate the truth of the statement is a significant factor in deciding whether the publisher was negligent (see § 580B, Comment h), and it may have some relevance in determining whether the publisher acted with reckless disregard as to truth or falsity.

Restatement (Second) of Torts § 580A, comment d.

"Before the test of reckless or knowing falsity can be met, there must be a false statement of fact." *Austin*, 418 U.S. at 284, or a false representation of fact. *Id.* at 286. *See Steinhilder v. Alphonse*, 68 N.Y.2d 283, 501 N.E.2d 550, 123 L.R.R.M. (BNA) 2937, 2941 (1986) (calling a co-worker a "scab" may be either a statement of opinion or a fact depending upon the circumstance). Here, the tale told by respondents to Geske's customers were total fabrications. They were not equivocal statements or opinions, but a set of facts absolutely untrue. Local 150's claims that Geske was "out of business" and Geske's workers were themselves striking, is in utter isolation of the only facts relevant to support such a public charge. These allegations against Geske were facially false statements of fact that represented evidence of actual malice or at least reckless disregard for the truth, in the circumstances that Local 150 knew were untrue or could ascertain the truth.

The union knows that a necessary element of a "strike" is the existence of an employee-employer relationship and that this relationship did not exist between Local 150 and Geske. Local 150 is a knowledgeable labor organization and is presumed to know that a "strike" is a situation where employees refuse to work for their employer to coerce concessions to employees' demands. *See NLRB v. Illinois Bell Telephone Co.*, 189 F.2d 124, 127 (7th Cir. 1951) ("The term 'strike' is applied commonly to a combined effort on the

part of a body of workmen *employed by the same master* to enforce a demand."). "After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses." *Linn*, 383 U.S. at 63.

The courts have carefully affirmed the distinction between the opinion portion of a statement and the fact portion of a statement as the Restatement has done. *Id.* at 983. If part of a communication is privileged and part is not, a defendant is liable for the unprivileged portion. § 599, Comment b. "If for any reason it is found to be impossible to make a severance of the harm done, the privilege is lost and the defendant is subject to liability for the total harm. § 605A, Comment b. *Mittelman v. Witous*, 135 Ill. 2d 220, 552 N.E.2d 973, 1983 (Sup. Ct. 1989) (mixed expression of opinion actionable); *Higgins v. Gordon*, 433 N.W.2d 306 (Ct. App. IA 1988) (explaining application of Restatement of Torts).

In this context, the appellate court's refusal to adopt the *New York Times/Linn* test was clear error and establishes a grave precedent that will have immediate repercussions in the states.[9]

Since the action of the court below impermissibly intrudes on the federal scheme that this Court in *Linn* carefully constructed to "limit[] the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice or caused him damage," 383 U.S. at 64-65, the Court should grant the Petition to resolve the conflicting interpretation of federal law being made in the state courts and

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[9] This is an important question in Illinois itself. Local 150 is involved in at least three cases presently in which the First Question Presented is in issue: *Geske & Sons, Inc. (the instant case) v. Operating Engineers, Local 150, Lowe Excavating Co. v. Operating Engineers, Local 150*, No. 88-CH-034 (Illinois), and *DiMucci Construction Co. v. Operating Engineers, Local 150.*, No. 90-L-441 (Illinois). The issue also arose in *Virgil Jean v. William E. Dugan*, 814 F. Supp. 1401, 1410 (N.D. Ind. 1993) (Dugan is President of Operating Engrs., Local 150). Each case has applied a different view of *Linn*.

assure the supremacy of federal law under the Supremacy Clause of the Constitution, Art. VI, Sec. 2.

II. THE APPELLATE COURT'S RULING THAT HELD FACIALLY UNTRUE LANGUAGE CANNOT BE ENJOINED CONFLICTS WITH DECISIONS IN OTHER STATES THAT ALLOW UNION FALSE STATEMENTS OF FACT TO BE RESTRAINED

Just as the this Court recognized years ago that a union has a privilege to conduct "limited recognitional picketing," *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), this Court has recently ruled that the privilege does not extend to nonemployee union organizers who engage in tortious activity. *Lechmere v. NLRB*, 112 S. Ct. 843, 846-47 (1991).

In *Lechmere*, the NLRB attempted to impair an employer's property rights by allowing organizers to march upon it. The Court ruled that an employer did not lose its property rights when non-employees attempt economic action against it. Moreover, the Court recognized a "critical distinction between the organizing activities of employees (to whom § 7 guarantees the right of self-organization) and nonemployees (to whom § 7 applies only derivatively)," 112 S. Ct. at 846. In these cases, "the trespasses of nonemployee union organizers are 'far more likely to be unprotected than protected.'" *Id.*

In the present case, the decision of the California Supreme appellate court in *Magill Bros., Inc. v. Building Serv. Employees' Int'l Union*, 20 Cal. 2d 506, 127 P.2d 542 (1942), is persuasive authority that untruthful language may be enjoined in labor disputes. There, the union attempted to organize the employer's workers without an election, *id.* When the employer refused to sign a contract based solely upon the union's demand for recognition, the union began picketing with signs stating: "This house on strike. A.F.L."

The employer brought an action for preliminary injunctive relief. *Id.* at 543. "The sole issue, therefore, is whether the trial court erred in denying injunctive relief in a case where it found that the banners and signs carried by the pickets conveyed false and untrue information to the general public." *Id. Also United Farm Workers v. Superior Court*, 4 Cal. 3d 556, 483 P.2d 1215, 77 L.R.R.M. (BNA) 2208, 2216-17 (1971) (untruthful picketing statements enjoinable).

The Supreme Court of California held that "[t]here can be no doubt that untruthful picketing is unlawful picketing." *Magill*, 127 P.2d at 543. It further found that,

> here is not the utterance of false statements which is sought to be enjoined, but the conduct of picketing in an unlawful manner. The rule in this regard is analogous to the principle that while equity will not ordinarily enjoin activity which is criminal in nature, neither will it refuse to act where an independent ground for relief is presented merely because the acts sought to be enjoined are criminal. See 5 Pomeroy, Equity Jurisprudence, Equitable Remedies, 2d Ed. § 2050, p.4630. Despite theoretical criticism and despite the fact that the publication of false statements alone will not justify equitable relief, *it is the nearly unanimous rule throughout the country that equity will intervene where false or fraudulent statements are combined with picketing and where, under local policy, this renders the picketing illegal.*

127 P.2d at 544 (emphasis added).

Thus, the *Magill* court held that "[t]he right to restrain the use of false or untruthful statements made in connection with picketing does not restrict the right to picket peacefully and honestly." 127 P.2d at 545. As Geske has argued here, it sought to enjoin the union's conduct of engaging in false publications, not in utterly restraining the union's right to picket or to inform the public truthfully that unionization is best for Geske's workers.

As the *Austin* Court clarified, there are many ugly statements a union may make under federal law. However, the same law removes its shield when the union is not providing opinionated statements to the public, but is providing the public with factually false information that the union knows is untrue or is in reckless disregard for the truth. Where Local 150 has supplemented its "On Strike" signs with utterances to the public that it was Geske's own employees that were on strike, state court's are not powerless to stop the publications that are defamatory in nature.[10]

Consequently, the present order of the Illinois appellate court places Illinois court's at odds with the jurisprudence developed post-*Linn* in other states and fails to protect the important property interests of neutral employers and workers. The failure of the appellate court below to consider these factors in failing to use the proper legal standards in deciding whether to grant injunctive relief for the factual statements/misconduct aspects of Local 150's acts, is grave error that requires this Court' supervision to correct.

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[10] This case would be much different if Local 150 informed customers that it was "acting on behalf of its members, to unionize the plaintiff's workplace," as the appellate court suggests. 9a. However, publicizing the truth would not provide Local 150 with the desired attempt to sufficiently injure Geske financially into recognizing Local 150. As the testimony in the circuit court reflects, the public will respect a picket line set up by employees, but is likely to cross lines set up by the union for recognitional or area standards purposes. Tr. Vol. II at 142-44.

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: October 1, 1993

No. 2-91-1169

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

This Order Is Not Precedential
And Is Not To Be Cited

GESKE & SONS, INC.,	) Appeal from the Circuit Court) of McHenry County.
Plaintiff-Appellant,	)
v.	) No. 91-CH-273
INTERNATIONAL UNION OF OPERATING ENGINEERS, NO. 150; CHUCK AUGUST, et al.,	) Honorable) Michael J. Sullivan
Defendants-Appellees.	) Judge, Presiding.

ORDER

The plaintiff, Geske & Sons, Inc., appeals from a September 27, 1991, directed finding by the trial court for the defendants, the International Union of Operating Engineers Local No. 150 and Chauffeurs, Teamsters and Helpers Local Union No. 301, denying the plaintiff's requested injunctive relief. The plaintiff argues on appeal that (1) the court used the wrong corporate libel standard; (2) the court's finding that the "on strike" language on the picket signs did not assail the plaintiff's business methods or financial condition was against the manifest weight of the evidence; (3) the court's finding that there was no tortious interference with contractual relations and prospective advantage was against the manifest weight of the evidence; and (4) the court erred in finding that the Illinois Anti-Injunction Act (Ill. Rev. Stat. 1991, ch. 48, par. 2 (a)) barred injunctive relief.

The plaintiff is a corporation engaged in the business of asphalt paving and the manufacture of asphalt mix for sale to commercial customers. The plaintiff is an open shop employer and its employees are not represented by any labor union. The defendants are labor organizations that represent operating engineers of heavy excavating and earth moving equipment and drivers who haul material.

On September 5, 1991, the plaintiff filed both its original and its amended verified complaints for a temporary restraining order, for preliminary and permanent injunctions, and for damages against the defendants. The plaintiff alleged that the defendants had committed trade libel against it by picketing at the plaintiff's plant with false "on strike" signs. Additionally, the plaintiff alleged that the defendants committed tortious interference with contractual relations and tortious interference with prospective economic advantage by interfering with the loading and unloading of material and threatening and intimidating customers who attempted to conduct business with the plaintiff.

On September 5, 1991, the plaintiff obtained a temporary restraining order against certain alleged conduct by the defendants. On September 6, 1991, the defendants filed a petition of removal to the United States District Court for the Northern District of Illinois. In their petition, the defendants asserted that the plaintiff alleged cognizable claims under federal law, or, alternatively, against conduct protected by the National Labor Relations Act (NLRA)(29 U.S.C. 151, et seq. (1982)). The federal court remanded the plaintiff's complaint, concluding that the complaint did not contain a federal claim and was, therefore, not subject to removal.

On September 12, defendant Local 150 moved to dismiss the plaintiff's claims on the ground that the claims were preempted by federal law or, alternatively, that the Illinois Anti-Injunction Act (Ill. Rev. Stat. 1991, ch. 48, par. 2(a)) precluded injunctive relief. After hearing oral argument on September 16, 1991, the court denied Local 150's motion to dismiss, and stated that the issue of the Anti-Injunction Act was premature.

On September 27, 1991, after an evidentiary hearing, where the plaintiff presented approximately 18 witnesses, the court granted a directed finding for the defendants pursuant to section 2-1110 of the Code of Civil Procedure (Ill. Rev. Stat. 1991, ch. 110, par. 2-1110). The plaintiff appeals from that directed finding.

The following pertinent testimony underlies the plaintiff's claims against the defendants. On August 19, 1991, the defendants' picketers stationed themselves in front of the plaintiff's asphalt plant with picket signs. The signs stated that "I.U.O.E. Local 150 On Strike against Geske For Recognition As Majority Bargaining Representative of Company's Operating Engineer Employees." The "on strike" language was in large bold red letters while the balance of the words on the signs were handwritten in a fraction of the "on strike" size.

On that same date, two of plaintiff customers, Performance Paving and All American Asphalt Maintenance (All American) attempted to obtain asphalt from the plant. When Performance Paving pulled a truck up to the plant, the picketers stood in front of the truck and stated to the driver, "Geske employees are on strike, why don't you go to [Geske's competitor]." The driver turned around and left the plaintiff's plant without asphalt. The same statement was made by a picketer to All American drivers, and to its owner. Some picketers held up lit lighters and told an All American driver that they knew where he parked his truck in Mundelein. The All American drivers left the plant without hauling any asphalt.

The picketers also followed those trucks that crossed their picket lines. There was testimony that the picketers sometimes drove several feet behind the trucks, at up to 55 miles per hours. Also, there was testimony that the picketers drove very closely both in front and behind the loaded trucks. There was also testimony describing various intimidating behavior on the part of the picketers, and threats made to customers that if they used the services of the plaintiff, they too would be picketed by the defendants.

The plaintiff alleges that as a result of the picketers' unlawful activities, 60% of the plaintiff's regular credit customers now refuse to do business with it. Additionally, the plaintiff asserts that its aggregate and cartage suppliers now refuse to do business with the plaintiff.

The defendants argue, at the outset, that the Plaintiff's claims for injunctive relief are preempted by section 8 of the National Labor Relations Act (NLRA) (29 U.S.C. 158 (b)(7)(1982)). This provision requires preemption whenever conduct complained of is "arguably subject" to the jurisdiction of the National Labor Relations Board (NLRB). (*Lowe Excavating Co. v. International Union of Operating Engineers Local No. 150* (1989), 180 Ill. App. 3d 39, 44). However, there is an exception to preemption when the State's interest outweighs any peripheral federal concern or "where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that, in absence of compelling congressional direction, we could not infer the Congress had deprived the States of the power to act." (*Lowe*, 180 Ill. App. 3d at 45, citing *San Diego Building Trade Council, Millmen's Union, Local 2020 v. Garmon* (1959), 359 U.S. 236, , 3 L.Ed.2d 775, , 79 S. Ct. 773, .) Restated, if the risk of interference by State involvement is minimal and the activity in question is only a peripheral concern of the NLRB, the matter is not preempted, and the State may proceed. *Lowe*, 180 Ill. App. 3d at 45.

The United States Supreme Court, in the case of *Linn v. United Plant Guard Workers of America, Local 114* (1966), 383 U.S. 53, __, 15 L.Ed.2d 582, __, 86 S.Ct. 657, __, specifically held that the State's interest in redressing malicious libel is so deeply rooted in local feeling and responsibility that it fits within the exception specifically carved out by *Garmon*, and that such claims are therefore not preempted. See also *Fisher v. Illinois Office Supply Co.* (1984), 130 Ill. App. 3d 996, 999-1000; *Krasinski v. United Parcel Service, Inc.* (1988), 124 Ill. 2d 483, 493-94.

The defendants argue on appeal, that in contrast to ordinary libel actions, the plaintiff in the case at bar is asking the State court

to determine whether the defendants falsely picketed by merely "implying" that its employees were on strike, thus injecting the court directly into the merits of a labor controversy. However, the underlying issue in this case is not whether the defendants are entitled to picket, thereby forcing the employees or employers to recognize the defendants as a bargaining representative, but rather whether the defendants committed trade libel. These issues are only of peripheral concern to the NLRB. (See *Krasinski*, 124 Ill. 2d at 493.) We therefore find that this cause of action fits into the exception carved out by *Garmon* and therefore, we find that we are not preempted by the jurisdiction of the NLRB.

We next address the merits of the plaintiff's arguments on appeal. Pursuant to section 2-1110 of the Code of Civil Procedure (Ill. Rev. Stat. 1991, ch. 110, par. 2-1110) in all cases tried without a jury, a defendant may, at the close of the plaintiff's case, move for a directed finding. (*Dyduch v. Crystal Green Corp.* (1991), 221 Ill. App. 3d 474, 477.) In ruling on a motion for a directed finding, the court must first determine if the plaintiff has presented a *prima facie* case and enter judgment for the defendant if the plaintiff has failed to do so. (*Dyduch*, 221 Ill. App. 3d at 477.) If a plaintiff has presented a *prima facie* case, the court must weigh the evidence, including any favorable to the defendant, pass on the credibility of the witnesses, draw reasonable inferences and generally consider the weight and quality of the evidence. *Dyduch*, 221 Ill. App. 3d at 477.) The decision of the trial court to grant a defendants' motion for a directed finding will not be reversed on review unless it is against the manifest weight of the evidence. *Dyduch*, 221 Ill. App. 3d at 477.

In order to obtain preliminary injunctive relief, the trial court must determine, among other factors, the likelihood that the plaintiff will succeed on the merits of the claim. (*Handy Andy Home Improvement Centers, Inc. v. American National Bank and Trust Co.* (1988), 177 Ill. App. 3d 647, 652.) In the case at bar, the trial court denied the preliminary injunction on the basis of this consideration; it found that the plaintiff had little likelihood of success on the merits of its claims.

In the court's determination of the plaintiff's likelihood of success on the merits of its libel claim, the court applied the test for corporate trade libel set forth in *Vee See Construction Co. v. Jenson and Halstad*, (1979), 79 Ill. App. 3d 1084, 1088. The court noted that the *plaintiff* argued that this was the proper standard to use in the instant case. The standard in *Vee See* requires that "the statements allegedly defaming the plaintiff in its trade or business must assail the corporation's financial position or business methods, or accuse it of fraud or mismanagement." (*Vee See*, 79 Ill. App. 3d at 1088-89.) The court found that the "on strike" signs and any reasonable extension of what the signs read could not be thought to assail the corporation's financial position or its business methods, nor did it accuse the plaintiff of any type of fraud or mismanagement.

The plaintiff argues, for the first time on appeal, that the court applied the wrong trade libel standard, asserting that the court should have applied the standard of malice or reckless disregard for the truth as set forth in *Lowe Excavating Co. v. International Union of Operating Engineers Local 150* (1989), 180 Ill. App. 3d 39, 47-48. The plaintiff argues that this libel standard should apply here because the trade libel alleged in this case is in a "labor context" as opposed to a traditional corporate context.

In *Lowe*, a plaintiff employer sued a defendant union to enjoin the defendant from picketing with placards that purportedly contained false statements. (Lowe, 180 Ill. App. 3d at 43.) The sole issue in front of the *Lowe* court was whether the trial court's determination of federal preemption was proper. (*Lowe*, 180 Ill. App. 3d at 43.) In explaining why the issue in that case was only of peripheral concern to the NLRB, but of great concern to the State, thereby precluding preemption, the court stated in *dicta* that the issue facing the lower court was not a labor law question, but "whether the defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth." *Lowe*, 180 Ill. App. 3d at 47-48.

The Illinois Supreme Court has stated that the precedential scope of a decision is limited to the facts before the deciding court.

(*Board of Trustees of Police Pension Fund v. Illinois Human Rights Comm'n* (1986), 141 Ill. App. 3d 447, 455.) General expressions in a court's opinion which go beyond what is necessary to decide a case are entitled to respect; however, such expressions are not binding authority. *Board of Trustees*, 141 Ill. App. 3d at 456.

When read in context, the *Lowe* court's comment did not define a new standard by which to judge a libel action brought by a corporation. The court merely inartfully attempted to point out that the issue in the lower court did not require interpretation of a labor dispute controlled by federal law, but only a determination of whether the picket signs constituted libel. The case law pertaining to libel, where the plaintiff is a corporation, is clear: the alleged defamation must assail the corporation's financial position, business methods, or accuse it of fraud or mismanagement. See *Harris Trust & Savings Bank v. Phillips* (1987), 154 Ill. App. 3d 574, 579; *American International Hospital v. Chicago Tribune* (1985), 136 Ill. App. 3d 1019, 1025; *Audition Division, Ltd. v. Better Business Bureau* (1983), 120 Ill. App. 3d 254, 256; *Vee See*, 79 Ill. App. 3d at 1088-89.

The plaintiff argues that even if the Vee See standard of libel is used, the court' s finding that the picket signs did not constitute libel was against the manifest weight of the evidence. The plaintiff further argues that if *Vee See* is the proper standard, it should be more liberally applied because this case is in a labor context.

We find that the *Vee See* standard was proper in this case because the plaintiff was a coporation. We also are not convinced by the plaintiff that the *Vee See* standard should be interpreted differently because this is a labor context. Lastly, we do not find that the court's determination, that the "on strike" signs were not libelous, was against the manifest weight of the evidence. See *Dyduch*, 221 Ill. App. 3d at 477.

The plaintiff next argues that the court's finding that the defendants did not tortiously interfere with its contractual relations and prospective economic advantage was against the manifest weight

of the evidence. The plaintiff notes the court's finding that the evidence established that there was a certain level of interference by the defendants, but that the interference was not wrongful, unlawful, or violent. The plaintiff, however, asserts that there is no requirement that tortious interference be unlawful, wrongful or violent to constitute a tort, and that the defendants tortiously interfered with it by the "misrepresentations" on their signs and by harassing the plaintiff's customers. The defendants argue that their conduct of "recognitional picketing" is protected, and is, therefore, not unjustified or wrongful.

The court found that there was no significant evidence of any unlawful trespass on the part of the defendants, that the defendants were not doing any unlawful act by following trucks that left the plaintiff's plant, and that stopping customer trucks to talk to drivers did not constitute wrongful interference. The court also found that there was no evidence of threats of violence to any person.

In an action for tortious interference with prospective economic advantage, the plaintiff must prove (1) his reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference. (*Fellhauer v. City of Geneva* (1991), 142 Ill. 2d 495, 511.) The elements for an action of tortious interference with contractual relations are similar. They require that the plaintiff establish, as a substitute for the third element, that the defendant intentionally and without justification induced a breach of contract; and they [sic] adds an additional element of "a subsequent breach by the third party caused by the defendant's wrongful conduct." *Certified Mechanical Contractors v. Wight & Co.* (1987), 162 Ill. App. 3d 391, 398.

The law recognizes that in many cases, a third party may be privileged to interfere with existing contractual relations (*Certified Mechanical*, 162 Ill. App. 3d at 400), and to interfere with a prospective economic advantage (see *Fellhauer*, 142 Ill. 2d at 512).

A third party is conditionally privileged when acting to protect a conflicting interest that is considered, under the law, to be of equal or greater value than the plaintiff's rights. However, the third party's acts must be legal and must not be unreasonable under the circumstances. (*Certified Mechanical*, 162 Ill. App. 3d at 400.) If conduct of a third party is conditionally privileged, the plaintiff must prove actual malice; the plaintiff must, then, establish that the defendant acted with a desire to harm which was unrelated to the interest that he was presumably seeking to protect. *Certified Mechanical*, 162 Ill. App. 3d at 401.

In the instant case, the activity of the defendant labor unions, namely, limited recognitional picketing, is protected by the NLRA. (See 29 U.S.C. 157-158 (1982); *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters* (1978), 436 U.S. 180, 194 n.24., __ L Ed. __, __ S.Ct. __) Also, a conditional privilege to lawfully interfere exists where a union is acting on behalf of its members. (See *Santucci Construction Co. v. Baxter & Woodman* (1987), 151 Ill. App. 3d 547, 554 citing *Connaughton v. Gertz* (1981), 94 Ill. App. 3d 265, 270.)

The situation alleged here does not present an instance of "outsiders intermeddling maliciously in the contracts or affairs of other parties." (*Fellhauer*, 142 Ill. 2d at 513.) Here, the defendants were acting on behalf of its members, to unionize the plaintiff's workplace. The defendants' "on strike" signs were not of a libelous nature, and cannot be the basis of a tortious interference claim. Furthermore, activities of the picketers were peaceful and lawful.

Taking the above factors into consideration, we find that under the circumstances the labor union was conditionally privileged to lawfully interfere with the contractual agreements and prospective economic advantage of the plaintiff. (*Certified Mechanical*, 162 Ill. App. 3d at 400-401.) Additionally, we do not find sufficient evidence in the record of actual malice on the part of the defendants to vitiate their conditional privilege. (*Certified Mechanical*, 162 Ill. App. 3d at 401.) For the above reasons, we do not find that the court's determination that the defendants were not guilty of tortious

interference with contractual relations and prospective economic advantage was against the manifest weight of the evidence. *Dyduch*, 221 Ill. App. 3d at 477.

The parties also address the issue of whether the cause of action is barred by the Illinois Anti-Injunction Act (Ill. Rev. Stat. 1991, ch. 48, par. 2(a)). We do not address this issue, as we affirm the court's dismissal on other grounds.

For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

Affirmed.

GEIGER, J., with UNVERZAGT and WOODWARD, JJ., concurring.

CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT

STATE OF ILLINOIS } GEN. NO. 91 CM 273
COUNTY OF MCHENRY } SS ☐ Jury ☒ Non-Jury

GESKE & SONS, INC.,
pltf.

vs.

IUOE LOCAL 150, and
TEAMSTERS Local 301

FILED
McHENRY COUNTY, ILLINOIS
SEP 27, 1991
VERNON W. KAYS, JR.
CLERK OF THE CIRCUIT COURT

Date 9/27/91 Plaintiff's Gerard C. Smetana Defendant's Dale D. Pierson
Attorney David LeSeur Attorney Harold McKenney

ORDER

This matter coming to be heard upon Defendants' Motion to find in their favor under § 2-1110 at the close of Plaintiff's evidence in support of their Motion for Preliminary Injunction, and the Court being fully advised, it is hereby ORDERED that for the reasons stated in open court Defendants' Motion is granted, and Plaintiffs' Motion for Preliminary Injunction is denied.

Plaintiff's motion, subsequent to the court's denial of Motion for Preliminary Injunction, to file 3d Amended Complaint, is granted, and it may be filed instanter.

Prepared by: Dale D. Pierson
Attorney for: IUOE, Local 150
Attorney Registration No. C000200 Judge /s/ Michael J. Sullivan

S.28931

STATE OF ILLINOIS)
)
COUNTY OF MCHENRY)

IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT
MC HENRY COUNTY, ILLINOIS

GESKE & SONS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 91-CH-273
	)	
INTERNATIONAL UNION OF	)	
OPERATING ENGINEERS,	)	
LOCAL NO. 150 AND	)	
CHAUFFEURS, TEAMSTERS	)	
AND HELPERS, LOCAL	)	
UNION NO. 301,	)	
	)	
Defendants.	)	

REPORT OF PROCEEDINGS had and testimony taken at the trial of the above-entitled cause, before the Honorable Michael J. Sullivan, Judge of said Court, at the McHenry County Government Center, 2200 North Seminary Avenue, Woodstock, Illinois, on the 27th day of September, A.D. 1991, at the hour of 10:00 o'clock a.m.

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THE COURT: I apologize for being a little later than I said, but there was more stuff here to read than I thought at the time; and

while counsel, you know, deal in the labor vineyard all the time, it is not something that the Court necessarily does.

The Court had to consider your arguments and really figure out what it is doing and why it is here today and what the purpose of this proceeding is.—

We are here and the Court has been hearing testimony with regard to a preliminary injunction that was entered previously in this case.

The Court has heard testimony on behalf of the plaintiff. The plaintiff has rested, and we are here now on the defendants' motion for a directed verdict or a directed finding at the end of the plaintiff's case.

As has been pointed out previously, there is a provision under the Code of Civil Procedure of the State of Illinois involving motions in non-jury cases, to find for defendant at the close of the plaintiff's evidence. It's Section 2-1110.

And the section of the statutes says, "In ruling on the motion, the Court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence."

The action that is before the Court on the complaint, the complaint as amended by the plaintiffs, seeking injunction, injunctive relief and other ancillary relief, basically, on three bases, three different counts of tort in the State of Illinois, 1, trade libel, on the other tortious interference with prospective economic advantage and the tortious interference with economic advantage, present tense.

There has been mention before by both parties of an earlier case deciding in the Second Appellate District, in which myself as presiding judge was involved, and one of the parties, the Local 150. The present plaintiff, Geskes, were not involved, but counsel Smetana and Pierson were involved, that being the Lowe, L-o-w-e, Excavating Company versus Local 150.

But for the change of parties, to a certain extent, this matter before the Court is how [sic] revisited, only Part 2.

In that case, this Court granted -- I don't remember the exact nature of the motion -- but I think a motion finding that the activities that were being conducted at that time were preempted by federal law or regulations; and then that matter went to the Second District Appellate Court, from whence it was reversed and remanded; and I know, I think one or both counsel had told me it went elsewhere; but, in any event, we are here with regard to the findings of the Second District Appellate Court.

In that case, the Appellate Court, as has been indicated before, and I have the 535 Northeast Second Reporter, Second Series, the case beginning at 1065, and at 1068, the Appellate Court has indicated the sole issue on appeal is whether the National Labor Relations Act deprived the State Court of jurisdiction to enjoin the union from picketing with placards containing knowingly false statements or statements made in reckless disregard to the truth.

And then the Court, in that case, cites the elements which a Trial Court should consider in deciding whether to issue a preliminary injunction; and also on Page 1068, it cites three standards: 1, the possibility of irreparable harm to the plaintiff's legal rights pending the outcome of the trial if the preliminary injunction does not issue; 2, the potential irreparable harm to the defendants' right if it does; and, third, the plaintiff's likelihood of success on the merits; and for those propositions, it cites a 1987 Supreme Court of Illinois case, Kanter, K-a-n-t-e-r, versus Eisenberg, E-i-s-e-n-b-e-r-g, versus Mattson & Associates, at 116 Illinois 2d, 506.

But it goes on to indicate that the issue before the Court in Lowe in the Appellate Court was not whether the Court abuses its discretion in denying the request for the injunction, but whether its refusal to exercise jurisdiction or discretion was proper.

And then it goes in and discusses the question of preemption; and on Page 1069, it talks about the second type of federal pre-

emption, which eventually it said, I think, didn't apply, and then which is, it said, "The second type of federal preemption requires preemption whenever the conduct complained of," and then in quotes, in open quotes, 'arguably subject,'" close quotes, "to the jurisdiction of the National Labor Relations Board." It goes on to say, in open quotes, "'However, even if the claim involves state torts that are arguably subject to jurisdiction of the NLRB.'"

The Court in Garmon, which is G-a-r-m-o-n, noted an exception to preemption, "When the State's interests outweigh any peripheral federal concern or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional discretion, we could not infer that Congress can deprive the State of the power to act."

And that case, again, was involving a request for injunction and the complaint alleged tortious interference with contractual relationships, tortious interference with prospective economic advantage, trade libel and negligent interference with a contractor.

The sign in that case that was the subject of the suit was a red, in quotes, "Notice to the Public: Lowe Excavating does not pay the prevailing wages and economic benefits for operating engineers which are standard in this area. Our dispute concerns only substandard wages and benefits paid by this company, Local 150, International Union of Operating Engineers, AFL-CIO," close quotes.

The Appellate Court in Lowe also noted that the Illinois Supreme Court held that an action in State Court for defamation is not preempted by the jurisdiction of the NLRB, and they cite at Krasinski, K-r-a-s-i-n-s-k-i, versus United Parcel Service, a 1988 case, 124 Illinois 2d at 483.

The Appellate Court found that, as far as the preemption went, that case, the Lowe case, fell into the exemption cited by Garmon.

And then, as alluded to by Mr. Smetana, the Appellate Court, on Page 1071 of the Lowe decision, stated, as follows:

"The underlying issue in this case is not whether plaintiff paid wages sufficient to meet area standards, the issue is whether defendant, with actual malice, published a statement with knowledge of its falsity or in reckless disregard for the truth. While the truth or falsity is an important element in the tort of trade libel, it is certainly not the only issue it be considered. The issues of injury to reputation and defendants' mental state must be considered."

The Appellate Court also went on to indicate -- and I think it's important with regard to this case -- that the defendant next contents [sic] that the State of Illinois had enforced [sic] the Anti-Injunction Act that is applicable. The Appellate Court noted that the Act may or may not apply. The issue was not before that Court, and the Trial Court could not reach the issue; therefore, the question of whether or not the Anti-Injunction Act applied in the Lowe case is not ripe for review.

In the Lowe case, finally what happened is the Appellate Court remanded to the Circuit Court of McHenry County this case to review the plaintiff's motion for a preliminary injunction consistent with the opinion.

That's why I say it's sort of Lowe Part 2, because that's where we are, at the stage of preliminary injunction, in determining whether or not one should be granted.

The Lowe case, a Second Appellate District case, sets forth the issues before the Court on a preliminary injunction, and another injunction case heard by this Court, the Second District, a 1988 case, Handy Andy Home Improvements versus American National Bank, which is found at 177 Illinois Appellate 3d, 674.

It just reiterates those standards, and I am just indicating that, as set forth in that Kanter versus Eisenberg case, the three standards, and those are basically the standards that I have applied.

Some of the other things I think are peripherally involved, but some of the ones that have a little more detail, are basically

temporary restraining order cases; and here, since both sides have had an opportunity to be present, and even at this point defendant has not presented any evidence. They have had an opportunity to cross examine

I am going to take those standards in reverse order and deal with first the likelihood of plaintiff's success on the merits, and in looking at the trade libel count first.

I note that, basically, this Court has to determine and look at things that are of interest to the State, in protectable interest of the State, as indicated in the cases cited in Lowe and cases that we have talked about here.

Both counsel have at various times cited the Court to the VeeSee Construction, that's V-e-e-S-e-e, Construction versus Jensen and somebody else. The case is found at 79 Illinois Appellate 3d, 1084, and at Pages 1089 to 90.

The Appellate Court in that case stated -- this is not an absolute quote, but close to it -- the stated cause of action or libel per se where the plaintiff is a corporation, the statement must be allegedly defaming the plaintiff in its trade or business, must assail the corporation's financial position or business methods or accuse it of fraud or mismanagement, and that case has been cited by both the plaintiff and the defendant to this point.

The Court has to review the matters before the Court.

The Court was going to say, somewhat prefatory before that, you know, the matter before it and the issues before it the Court finds to be, in general, a troubling area, personally; but I'm not here personally, I'm here to try to apply the law as I can, and if we were in a perfect world, we possibly wouldn't have such conflict; but we are not, and the Court has to deal with issues as they are in the law and life as it is and do the best that it can to apply the law to the facts.

The sign that is in question in this case, the placard, which is, I think, the only written statement we really have here, and I am referring to Plaintiff's Exhibit No. 1, a photograph of a sign that reads, "IUOE Local 150," in bold letters, "On Strike," and in smaller letters, against, and then in a printed form, the word, "Geske," G-e-s-k-e, and then back to printed, "for recognition," and the next word is, "as majority bargaining representative of company's operating engineer employees." The sign is white, with red printing, except for the word "Geske," which is -- when I say "printing," I mean printed as opposed to handwritten. The word "Geske" is handwritten, and it's like a black or blue ink.

The Court must look to the sign, and to determine whether or not it falls within the area of the trade libel standard; and the Court has heard and considered the explanation as to how that standard applies, made by Mr. Smetana; but the Court believes that the sign, as indicated, does not fall within that definition of trade libel as set forth in the VeeSee case; that it does not -- and I don't think any reasonable extension of what it says could be thought to assail the corporation's financial position or business methods or accuse it of fraud or mismanagement.

And I would say peripherally -- and I think that maybe I shouldn't say anything because the case is pending before me -- but I don't think that the sign in Geske does by any reasonable interpretation indicate a trade libel against Geske, and I believe that the likelihood of success on the merits as to that count is small.

The issue was to tortious interference with contractual relationships and tortious interference with prospective advantage. I did note that, you know, Counsel for plaintiff, in talking about this, talked about interference with contractual relationships, but it has to be a tortious or a wrongful interference with contractual relationships.

Also, in commenting on some of the matters, first of all, there is no evidence in the record, as has been pointed out, with regard to

-- at least there is nothing that I recall -- as to violence, and I think that's been conceded.

The only question of threats, I think one has to -- again, the admonition of the Court is to weigh the evidence and to the credibility and the quality of the evidence; and on the issue of quality, in weighing it, rather than on the issue of credibility, I think one has to take a look at the evidence in the context of the group of people that we are dealing with.

We are not dealing with cloistered nuns, we are not dealing with second grade children, we are dealing with people in a labor situation, truck drivers, people who are more sophisticated or hardened in the ways of the world.

I'm not certainly saying that truck drivers or operating engineers or anyone else have to be subject to all kinds of treatment without retribution; but I think, you know, giving one the finger or being flipped off, these things, while certainly are rude, and crude possibly, in terms of everyday life, I don t believe can be thought to be, to one of normal sensibility, threatening, at least the -- some of the other gestures are. There is no evidence of anyone being that concerned about physical violence.

I think Mr. Larry Michael Geske indicated, and I think probably summed it up, that he was threatened, he felt threatened for the company, and that is in an economic sense.

But, you know, I think, fortunately, to a great extent, that's what these types of situations have somewhat to do with, economic situations, that is, economic struggles and strife.

The Court believes that there is evidence the activities -- I would say, before I get into that -- someone cited -- and I did read the case of Fellhauer, it's F-e-l-l-h-a-u-e-r, versus City of Geneva, 14 Illinois 2d, 495. It's a Supreme Court case arising out of the Trial Court decision in Kane County, in the Appellate Court of the Second District, involving an employee, apparently of the City of Geneva,

and there were a couple of counts I noticed. There was a retaliatory discharge count and there was a tortious interference count. It may have some other things.

The Appellate Court reversed the -- strike that.

The Supreme Court reversed the Appellate Court and affirmed the Trial Court; but in the course of that opinion, it indicated -- and, again, what I am doing is not an absolute quote, but it's fairly close, paraphrasing it

The Court, the Supreme Court stated it is generally recognized by Illinois courts that to prevail on a claim for tortious interference with prospective economic advantage, the plaintiff must prove, 1, a reasonable expectation of entering into valid business relationships; 2, knowledge by the defendant of the plaintiff's expectancy; 3, purposeful interference by defendant that prevented plaintiff's legitimate expectation to ripen; and, fourth, damages.

I think it is -- although it didn't talk about tortious interference with economic advantage -- it could be reasonably said that the elements there would probably be three or four, that there was a business relationship, that the plaintiff knew of it, that the interference prevented the continuation of that, or something to that effect, and that damages flow from it. That would be my -- it didn't talk about that, but generally that's what it would be.

I think the issue here before the Court, from the evidence it has before it on the issue of likelihood of success on both of these tortious interference counts, is whether or not there was a tortious interference.

The Court believes that the evidence does establish that there was a certain level of interference with the conduct of the plaintiff's business, based upon the evidence.

I think, by the very nature of having the picketers, et cetera, does have an interfering -- you know, that's intended. I mean, that is a part of it.

The question is whether or not, at least in the Court's mind, looking from the labor situation, as whether or not the interference was a lawful interference, whether or not there was anything wrongful or unlawful about the interference, based on the evidence.

And, again, the Court believes it is not looking into whether or not there was some kind of a labor violation, but whether or not there was a violation of some kind of some right that the State courts are here to protect.

There was discussion of this ambulatory picketing, is what it was called, and to whether or not it must, you know, stop at the gates of the third parties or can continue down in.

There was some evidence, at least reference to the fact that at least some of the employers did have some kind of an agreement that the union could come on or on the property for -- I think the testimony was "lawful purposes or picketing."

There is no evidence, other than a couple minor intrusions on the Geske property, which I don't believe had anything to do with picket signs, although there may have been one stuck in the ground and kicked over.

There is no evidence that the defendants committed any unlawful trespasses. There is some evidence, like with regard to, I think, the Lee pit, or something, that they went on, but I don't believe the record indicates that it was necessarily a trespass. I don't know whether it was or wasn't

As to the following in the cars, again, without getting into the fine points of labor, there does not appear to have been any significant wrong committed.

As to the stopping of traffic on this unnamed but road leading down to Geske -- maybe somebody did give it a name, I don't know -- but the road that goes to the conservation district, it goes to the Geske plant, goes to the Melahn property, and whatever else is on there, the evidence as to any illegal interference I don't think is particularly strong.

Again, there was no evidence of threats of violence; there was some conversation, but the Court further does not believe that the plaintiff has established that it has likelihood of success on the merits on either of these tortious interference matters.

And the Court would also -- because I know counsel always have an eye from going somewhere else -- would comment that, in something that the Lowe Court referred to, is the question of the applicability of the Anti-Injunction Act.

The Court has reviewed the terms of the Anti-Injunction Act, and considering the statute, considering the evidence that has been presented before the Court at this time, the Court does not believe that the plaintiff has persuaded the Court that, under the facts and circumstances of this case, that the Anti-Injunction Act is inapplicable; therefore, I find it to be applicable under the facts and the circumstances of this case, and that is a further reason why I am denying the preliminary injunction.

MR. PIERSON: Thank you, your Honor?

MR. SMETANA: Thank you.

THE COURT: Now, you had asked me to defer until I terminated this proceeding on your request to file a third amended complaint. I will take that up at this point, if you wish it.

MR. LE SUEUR: We would renew that motion for leave to file, your Honor.

THE COURT: That motion is renewed. Any comment at this time from the defendants?

MR. PIERSON: I guess the only comment would be, your Honor, that we would oppose it on the ground that we would believe that it would not -- or that it might call into question the decision you just made, and that it would be a tragedy if we had to just then go through the entire thing again, because of a change in parties or some additional facts that they have alleged, you know, that somehow changed circumstances.

THE COURT: Response?

MR. SMETANA: Briefly, in response, I believe we had stated that it was not our intent to seek preliminary injunctive relief at this time with respect to those other matters, and certainly the Court's decision here on the preliminary injunctive relief would certainly substantially chill any likelihood of proceeding in that fashion certainly at this time.

But I think we would nevertheless like to proceed for permanent injunctive relief on damages, and possibly find other authorities to convince the Court to reconsider its decision based on the VeeSee case and so forth, what the standards are with respect to trade libel in the State.

THE COURT: I believe the plaintiff has the right, whether it be in this proceeding or another proceeding, to bring additional claims.

To the extent that the Court has ruled on the preliminary injunction at this time, I certainly have no intention of revisiting that matter.

But there are additional people, there are additional counts, there are additional allegations at different times, and I would therefore at this time give the plaintiff leave to file the third verified complaint, amended, or whatever it is, with summons to issue against additional parties defendant.

MR. LE SUEUR: Thank you, Judge.

MR. SMETANA: Thank you.

MR. PIERSON: Your Honor, if I may raise a question about how to style the order.

Is it adequate to simply refer to "For the reasons stated in open court, defendant's motion for directed finding is granted and preliminary motion denied"?

MR. SMETANA: We could have a certified copy of the Court Reporter statement, your Honor, if that's as set forth in the opinion of the Court.

THE COURT: That's fine with me.

MR. PIERSON: Do you want a written order, though?

THE COURT: There should be a written order just stating it was denied, and then you want to refer to the transcript or whatever, however you want to do it; but there should be a written order.

MR. PIERSON: Very good. Thank you, your Honor.

MR. SMETANA: I want to thank the Court very much for its time and patience. It was most generous, as I said before.

MR. LE SUEUR: Thank you, Judge.

MR. PIERSON: Thank you, your Honor.

MS. FARR: Thank you, your Honor.

(WHICH were all the proceedings had in the above-entitled matter, at the time and place aforesaid.)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

June 3, 1993

Mr. Gerard C. Smetana
Law Offices of Gerard C. Smetana
333 W. Wacker Dr., S#470
Chicago, IL 60606

No. 75020 - Geske & Sons, Inc., petitioner, v. International Union of Operating Engineers, Local 150 et al., respondents. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1993.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GESKE & SONS, INC.,	)
	) DOCKET NO. 91 C 5659
Plaintiff,	)
	)
v.	)
	)
INTERNATIONAL UNION	)
OF OPERATING ENGINEERS,	)
et al.,	) CHICAGO, ILLINOIS
	) September 11, 1991
Defendants.	) 9:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARRY D. LEINENWEBER

APPEARANCES:

FOR THE PLAINTIFF: Mr. GERARD C. SMETANA
(Richman, Lawrence, Mann,
Greene & Smetana
333 West Wacker Drive
Chicago, Illinois 60606)

FOR THE DEFENDANTS: MR. DALE D. PIERSON
(Baum & Sigman, Ltd.
200 West Adams Street
Chicago, Illinois 60606)

MR. MARTIN BARR
(Carmell, Charone, Widmer
Mathews & Moss
225 West Washington Street
Chicago, Illinois 60606)

THE CLERK : 91 C 5659, Geske & Sons vs. International Union.

MR. PIERSON: Good morning, your Honor. Dale Pierson on behalf of Local 150 of the Operating Engineers.

MR. BARR: Good morning, your Honor. Martin Barr on behalf of the defendant, Local 301.

MR. SMETANA: Good morning, your Honor. Gerard Smetana for the plaintiff, Geske & Sons.

THE COURT: On the motion to remand.

Plaintiff filed a three count complaint in state court arising out of a labor dispute with the defendant unions. Plaintiff is non-union and apparently wants to remain so. The defendants are picketing plaintiff to coerce it into entering into a collective bargaining agreement. The complaint alleges that defendants are untruthfully informing the public and plaintiff's customers that its employees are on strike, that it is out of business, and that its competitors are cheaper. It also alleges that the defendants are threatening its employees and customers with bodily harm and property damage. As a result some of plaintiff's customers have stopped doing business with plaintiff.

The complaint as originally drafted also make allegations in Paragraph 18 that defendants are carrying out a secondary boycott. The prayer of each count of the complaint, however, remains true to the count's characterization. The three counts are characterized a trade libel, tortious interference, contractual relations and tortious interference with prospective advantage, all of which are cause of actions available under Illinois common law.

The defendants removed the case to this court on the basis of federal question jurisdiction. The plaintiff has filed a motion to remand for lack of jurisdiction.

The Supreme Court in Caterpillar, Inc. vs. Williams, 107 S.Ct 2425 (1987), set forth the principles governing removal jurisdiction.

> "The presence or absence of federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. (Citation omitted). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."

Here the plaintiff has pleaded three state common law claims and has avoided praying for any relief based on any federal statute.

The defendants, however, contend that plaintiff in Paragraph 18 has in fact pleaded a claim of secondary boycott which is prohibited by Section 303 of the LMRA. Assuming the paragraph contains sufficient allegations to state such a claim, it is clearly unnecessary for the plaintiff's common law claims and can be disregarded under Illinois law as surplusage. 30 ILP, "Pleading", Section 13. In any event, what defendants are raising is a defense to plaintiff's three claims, that is, that because of the peculiar facts of this case plaintiff's claims are preempted by the LMRA. However, Caterpillar answers this objection:

> "Ordinarily federal preemption is raised as a defense to the allegations in a plaintiff's complaint. Before 1887 a federal defense such as preemption could provide a basis for removal, but in that year Congress amended the removal statute. We interpret that amendment to authorize removal only where original federal jurisdiction exists. Thus, it is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption."

Thus, defendants may be correct that plaintiff will prove a claim that is preempted by federal law. The defendants may also be correct that plaintiff may not even state a claim under state law. If so, the state court can dismiss the complaint either because of preemption or for failure to state a claim. In fact, the two Supreme Court cases relied on by defendants, Sears, Roebuck and Company vs. San

Diego, 98 S.Ct. 1745 (1978) and Amalgamated vs. Lockridge, 91 S.Ct. 1909 (1971) were both appeals of state court rulings on preemption.

There are two exceptions to the well-pleaded complaint rule, the "complete preemption" doctrine (Caterpillar, at Page 2430) and its corollary, the "artful pleading" doctrine. (See Lingle vs. Norge Division of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987) reversed on other grounds, 108 S.Ct. 1877 (1988). These two doctrines have been applied primarily to Section 301 claims to enforce collective bargaining agreements and claims under ERISA. (See Caterpillar, at Page 2430 and Metropolitan Life Insurance Co., 107 S.Ct. 1542 (1987), neither of which is implicated here. No one contends, as with ERISA, that Section 303 sought to preempt the entire labor-related tort field. (See Metropolitan, at Page 1547 and Lowe Excavating vs. Local No. 150, 129 Ill. Dec. 300, 2nd Dist. 1989).

In conclusion, because plaintiff's complaint does not on it face contain a federal claim, It is not subject to removal here.

Accordingly, plaintiff's motion is granted and the cause is remanded to state court.

MR. SMETANA: Could we get a copy of that order, Your Honor?

THE COURT: Pardon?

MR. SMETANA: Could we get a copy of that order to take to state court?

THE COURT: You will have to order it from the court reporter.

MR. SMETANA: Could we get a Xerox of your copy, perhaps?

THE COURT: No. You will have to talk to Mr. Cheek.

MR. SMETANA: We will talk to the reporter. Thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause.) I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ James W. Cheek
Official Court Reporter

10-23-91
Date

Minute Order Form (rev. 12/90)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number 91 C 5659 Date SEP 11, 1991

DOCKET ENTRY Plaintiff's motion for remand is granted. Cause remanded to State Court.

No. 93-528

In The

Supreme Court of the United States

October Term, 1993

GESKE & SONS, INC.,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Petitioner waived its argument that the trial court applied the wrong legal standard by raising it only for the first time on appeal, particularly where the state law standard applied by the trial court was that which Petitioner itself advanced and where the trial court denied Petitioner injunctive relief by application of a state law standard more favorable to it.

2. Whether state law libel claims based upon the language of picket signs are preempted by federal law.

3. Whether the trial court erred in denying Petitioner preliminary injunctive relief after hearing no evidence to support a finding that Respondents acted with actual malice.

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29 U.S.C. § 163 8

Rule Cited:

Supreme Court Rule 15.1 5

Other Authority Cited:

Illinois Code of Civil Procedure ch. 110¶ 2-1110 2

No. 93-528

In The

Supreme Court of the United States

October Term, 1993

GESKE & SONS, INC.,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Procedural History

On September 5, 1991, Plaintiff-Petitioner, Geske & Sons,

Inc., filed its original and then its first amended "Verified Complaint For Temporary Restraining Order, Preliminary and Permanent Injunctions, and Damages" against the Union Defendants and their agents including International Union of Operating Engineers, Local 150, AFL-CIO, Respondent here. There the Company alleged Illinois common law claims of trade libel, tortious interference with contractual relations and tortious interference with the prospective business advantage (Appendix to Petition for Writ of Certiorari at 21a). Based upon that complaint, the Company sought and obtained an *ex parte*, after hours, temporary restraining order against certain of the Union's purported conduct.

On September 6, 1991, the Union Defendants filed with the state court their notice of removal to the United States District Court for the Northern District of Illinois (Petitioner's Appendix at 27a). There the Union asserted that the Company's claims were preempted by federal labor law (Petitioner's Appendix at 28a). Acknowledging that the Union might ultimately prove federal preemption, the district court nevertheless remanded the case on the ground that the Company's complaint did "not on its face contain a federal claim" (Petitioner's Appendix at 29a). That order was, of course, not appealable. 28 U.S.C. § 1447(d).

On September 12, 13, 20, 23, 24, 25, and 26, 1991, the trial court heard Petitioner present eighteen (18) witnesses in support of its motion for preliminary injunction. On September 27, 1991, the Union moved for a directed finding under the Illinois Code of Civil Procedure ch. 110 ¶ 2-1110. The trial court found *inter alia* the Company's likelihood of success on the merits of its trade libel and tortious interference claims to be "small" (Petitioner's Appendix 18a); and that the terms of the Illinois Anti-Injunction Act (Ill. Rev. Stat. ch. 48 ¶ 2a) also precluded injunctive relief (Petitioner's Appendix 22a).

On October 15, 1991, the Company filed an interlocutory appeal of the trial court's denial of injunctive relief. (Proceedings in the trial court have been stayed pending exhaustion of Petitioner's admittedly dispositive appeal.) On appeal to the Illinois Appellate Court, the Company argued for the first time that the state law trade libel standard which it advanced and which the trial court applied in denying the Company injunctive relief was incorrect and that its claim should instead be assessed under the "actual malice" standard applied to allegedly defamatory speech made in the course of labor disputes under *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966) and *Old Dominion Branch No. 496 Letter Carriers v. Austin*, 418 U.S. 264 (1974) (Petitioner's Appendix at 6a; Petition for Writ of Certiorari at 12 fn. 7, "Geske respectfully submits that the observation [that it raised this argument for the first time on appeal] is *not* incorrect . . ." (emphasis added)). On September 29, 1992, the appellate court rejected the Company's belated effort to change the standard it wanted applied to its claims and affirmed the decision of the trial court. On January 5, 1993, the appellate court denied rehearing on the matter. On June 3, 1993, the Illinois Supreme Court denied the Company's petition for appeal as a matter of right or for leave to appeal (Petitioner's Appendix 25a).

B. Statement of Material Facts

Local 150, International Union of Operating Engineers, AFL-CIO is a labor organization representing employees of employers engaged in the heavy construction and material production industries throughout northern Illinois and Indiana. Geske & Sons, Inc., is a producer of asphalt and a road building contractor operating within Local 150's territorial jurisdiction. On August 19, 1991, Local 150 began picketing Geske & Sons in an effort to obtain recognition from the Company as the exclusive collective bargaining representative of its employees. Towards that end, until September 17, 1991, the Union stationed picketers across the street

from the Company's asphalt plant entrance; at various of its job sites; and followed certain of its supply trucks to their sources of supply where it stationed picketers. Throughout that time the picketers carried or fixed in the ground signs which read: "Local 150, IUOE On Strike Against Geske & Sons For Recognition As Majority Bargaining Representative Of Company's Operating Engineer Employees."

In support of its litigation efforts to stop the Union's picketing, the Company filed suit in state court seeking injunctive relief alleging variously that the Unions were "physically blocking" (Complaint ¶ 14) access to the Company's premises; threatening their customers with physical violence and damage to their property (Complaint ¶¶ 10, 19, 22); and libeled their business by falsely claiming that the Company's own employees were on strike (Complaint ¶¶ 20, 26-27).

Despite the voluminous record created by the Company in its effort to secure a preliminary injunction, however, the trial court found no evidence of physical violence attributable to the Union; no evidence that unlawful trespass or blocking of vehicles had occurred; and no evidence of threats other than the admitted *economic* threat posed by pressure from the Union (Petitioner's Appendix 19a-21a). Indeed, the Company so utterly failed to support its allegations that its counsel conceded in oral argument before the trial court that there had been no violence during the picketing (Vol. IX at 1302). Moreover, the trial court simply rejected the interpretation of the Union's picket sign advanced by the Company (Petitioner's Appendix 18a).

As the trial court found, careful examination of the record in this case reveals the Company's assertions to be all exaggeration and prevarication. Union representatives never suggested that Geske's own employees were on strike; pretended that they themselves were Company employees; or in any way threatened or

endangered the safety of Company employees, its customers or the integrity of their property. The Company's reliance in its petition on allegations from its complaint rather than the voluminous record or the conclusions of the trial court dramatically exposes the paucity of its evidence.

C. Petitioner's Misstatements

The Company's entire Petition is a misstatement of the record, proceedings and decision of the trial court. It is, at best, disingenuous; at worst, dishonest. Consistent with the obligation to reference specific misstatements, Supreme Court Rule 15.1, Respondent points out the most egregious misstatements of the Petitioner as follows. First and foremost, *nowhere* in the pleadings or the record can the Company support its assertion that the Union claimed it represented Geske employees and that they were striking (Petition at 3-6). In fact, the Union's picket sign expressly stated that it was striking the Company for recognition as the representative of the Company's employees, plainly acknowledging its status as a third party. The Company offers three record references to support that assertion. That testimony is, however, consistent with the language of the picket signs: the *Union* is striking for recognition and that the Company's operating engineers wanted to be represented by it.

Next, contrary to the reference in footnote 2 (Petition at 6), the NLRB conducted no "representation proceeding" in the form of an evidentiary hearing and certainly none that included Local 150. Indeed, transcript references in this case reveal several heavy equipment operators in the employ of the Company (Tr. Vol. I at 19; Tr. Vol. V at 365). Nor did Local 150 representatives ever testify that they believed the picket signs would be understood as indicating Geske's own employees were on strike. Union Business Agent Mike Quigley testified that in 1987, picket signs said "on strike" when he and other workers struck for a contract (Vol. 8 at

1110-1111). The Company's reliance on this testimony is typical of their desperate efforts to distort the record to support their claims. Similarly typical is their purported "evidence" of violence by the Union. Despite the Company Attorney's admission that there was no violence and the trial court's express finding to that effect (Petition at App. 19a), the Company tries to paint a picture of danger and destruction (Petition at 6-7). These statements are simply false and should be rejected as such. The record in this case plainly reveals that the Union's conduct was at all times peaceful within the boundaries of state common law and federal labor regulation. The Company's efforts to portray it as otherwise in support of an exotic libel claim are reprehensible and should end now.

REASONS FOR DENYING THE WRIT

I.

THE COMPANY WAIVED ITS ARGUMENT THAT THE STATE COURT FAILED TO APPLY THE FEDERAL STANDARD ARTICULATED IN *LINN V. PLANT GUARD WORKERS* BY FAILING TO MAKE IT IN THE TRIAL COURT WHERE IT CONSISTENTLY ADVANCED A STATE LAW STANDARD.

Petitioner Geske & Sons brought its claim in state court under Illinois common law alleging trade libel, tortious interference with contractual relations and with prospective business advantage (Petitioner's Appendix 27a). Although it argued the applicability of the "actual malice" standard, it was careful to couch this argument in terms of state law. The Company opposed removal to the federal district court and that court agreed that it had raised only state law claims which carefully avoided any prayer for relief based on federal law (Petitioner's Appendix 28a). The trial court fully considered the Company's arguments couched in terms of

state law (Petitioner's Appendix 16a-18a) and rejected them.

Now the Company asserts that the trial court's failure to examine its claims expressly under the standard articulated by this Court in *Linn v. Plant Guard Workers*, 483 U.S. 53 (1966) is error. The Illinois Appellate Court rejected this argument at least in part on the ground it was advanced "for the first time on appeal" (Petitioner's Appendix 6a). The Company acknowledges the truth of this observation (Petition at 12 n. 7), but tries to excuse it by saying that in its motion for temporary restraining order it argued that the standard was one of actual malice as adopted by the Illinois courts in *Lowe Excavating Co. v. IUOE, Local 150*, 180 Ill. App. 3rd 39, 535 N.E. 2d 1065 (2nd Dist. 1989); and that it "must still be allowed as the question raises an issue of subject matter jurisdiction." Both these arguments are misleading and without merit.

The Company's strategy is a legal version of the old shell game: while in state court it couches its theories within state common law jurisprudence, careful to avoid any reference to federal law so as to defeat removal (Petitioner's Appendix 26a-30a). Now that it seeks relief from the Supreme Court, it argues the lower courts erred in failing to apply federal law. The Company cannot advance one theory in the trial court, convince the court to apply the law as it frames the issue, then claim legal error once it loses. Such a strategy is contrary to law and fundamentally unfair and should be rejected by this Court. Nor is a question of jurisdiction raised by the Company. Whether framed as state common libel law or a labor dispute requiring proof of actual malice, the state court retains jurisdiction. *Linn*, 383 U.S. at 61. The Company's "jurisdictional" argument is just another phoney excuse to obtain review by this Court, and should also be rejected.

II.

PETITIONER'S STATE LAW LIBEL CLAIMS ARE PREEMPTED BY FEDERAL LAW.

"States may not regulate activities that the NLRB protects, prohibits, or arguably protects or prohibits." *Wisconsin Department of Industry v. Gould*, 475 U.S. 282, 286 (1986); *San Diego Building Trades v. Garmon*, 359 U.S. 236, 245 (1959). Picketing for organization or recognitional purposes is protected by Section 7 of the NLRA. *Sears Roebuck & Company v. San Diego County District Council of Carpenters*, 436 U.S. 180, 194 n. 24 (1978); *NVE Constructors, Inc. v. NLRB*, 934 F.2d 1084 (9th Cir. 1991). For purposes of the NLRA, moreover, picketing has been equated with striking in protecting the methods of economic pressure available to unions. *Id.* at 1086 and n. 3; 29 U.S.C. § 163.

Here, the Union's picket signs expressly proclaim its object of securing recognition as the bargaining representative of the Company's operating engineer employees. This conduct is, therefore, protected under the NLRA and as such not subject to state regulation under the doctrine of federal preemption.

The Company argues that the federal libel standard applied to labor disputes as articulated in *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966) should be used to determine whether its claims against the Union and its picket signs are actionable. Its theory, however, is fundamentally different from that advanced in *Linn*. There, an employer's official sued various union officials and a company employee for allegedly libelous statements made in the course of an NLRB supervised representational election campaign. 383 U.S. at 55-56. Those statements included allegations that Linn and other company managers were "lying" to company employees, had "robbed" them of pay increases and warned that "Somebody may go to Jail!" 383 U.S. at 56. Such

statements are the stuff of which libel claims are traditionally made. By contrast, federal law regulating representation campaigns expressly tolerates misrepresentations by the parties. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). In balancing the rights of parties to labor disputes to "often speak bluntly and recklessly" in such "ordinarily heating affairs," against the individual right to be protected against injury from "defamatory or insulting material known to be false," *id.* at 61, the Court in *Linn* permitted the state courts to retain jurisdiction over such statements provided plaintiffs could prove actual malice. As the Court explained, "Judicial condemnation of the alleged attack on Linn's character would reflect no judgment upon the objectives of the union. It would not interfere with the board's jurisdiction over the merits of the labor controversy." *Id.* at 64.

Here, by contrast, the Company plainly asks this Court to inject itself into the merits of the labor controversy and judge the Union's objectives by interpreting the language of its picket signs and the meaning of its "on strike for recognition" message. As such, it is distinct from the traditional libelous statements which were the object of the controversy *Linn*, and are preempted by the exclusive jurisdiction of the NLRB.

III.

THE TRIAL COURT DID NOT ERR IN DENYING PRELIMINARY INJUNCTIVE RELIEF WHERE THE COMPANY FAILED TO PRESENT EVIDENCE THAT THE UNION'S STATEMENTS ON ITS PICKET SIGNS WERE FALSE, OR PUBLISHED WITH KNOWLEDGE OF THEIR FALSITY OR RECKLESS DISREGARD FOR THEIR TRUTH.

Although the Company never argued in the trial court that *Linn v. Plant Guard Workers* was the controlling standard to be

applied to its trade libel claims, it did argue that the Union statements were made with "actual malice" (Motion For Temporary Restraining Order and Preliminary and Permanent Injunction, ¶ 9). Indeed, throughout its pleadings, the Company asserted that the Union "knew that the statement contained on the [picket] signs was false and misleading. Alternatively, Local 150 should have known that the statement contained on the signs was false and misleading and, therefore, acted in reckless disregard for its truth or falsity" (Complaint ¶ 13).

The court rejected the Company's claims principally because the Company's interpretation of the signs is wrong (Petitioner's Appendix 18a). The Union's statement that it is striking the Company for recognition as majority representative of the Company's operating engineer employees, is truthful on its face and, therefore, cannot be known to be false. Even if the Company could avoid this logic, it failed to do so. The Company offered eighteen (18) witnesses over seven (7) days of evidentiary hearings. It fully articulated the substance of the standard it now advances, and fully apprised the court of how that standard should be applied to the evidence. It simply failed to prove its case. The court's findings were not clearly erroneous and no basis for review of its decision by this Court has been offered. *See, e.g., Doyton Board of Education v. Brinkman*, 443 U.S. 526 (1979); *Guzman v. Pichirilo*, 369 U.S. 698 (1962).

CONCLUSION

For all the above reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari to the Illinois Appellate Court for the Second Judicial District.

Respectfully submitted,

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No. 93-578

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

GESKE & SONS, INC.,

Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 AND CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION 301,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND JUDICIAL DISTRICT

PETITIONER'S REPLY BRIEF

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No. 93-578

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GESKE & SONS, INC.,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, NO. 150; CHUCK AUGUST, *et al.*,
Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondents do not take issue with Petitioner's core reasons for granting the Writ of Certiorari, that the test in *Linn v. Plant Guards Workers*, 383 U.S. 53 (1966), embodied in the Illinois appellate decision of *Lowe Excavating Co. v. Int'l Union of Operating Engrs.*, Local 150, 180 Ill. App. 3d 39 (2d Dist. 1989), is the standard that must be followed by state courts consistent with this Court's Decision in *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264 (1974), to avoid preemption.[1] Nor do Respondents contest the judicial importance of this issue and the striking state judicial conflict on this point.

---

[1]The statement of the *Linn-New York Times* libel standard found to be controlling and incorporated in *Lowe* is:

> The issue is whether defendant, with actual malice, published a statement with knowledge of its falsity, or in reckless disregard for the truth. While truth or falsity is an important element in the tort of trade libel, it is certainly not the only issue to be considered. The issues of injury to reputation and defendant's mental state must also be considered.

See Page 12, Footnote 6 of the Petition.

I. RESPONDENTS FAILED TO ADDRESS WHY A SINGLE FEDERAL STANDARD APPLICABLE TO LIBEL BY LABOR ORGANIZATIONS SHOULD NOT BE APPLIED BASED ON THE COURT'S SUGGESTION IN *OLD DOMINION, ET AL V. AUSTIN*

Respondents in Section II of the Opposition either misconceived or side-stepped the core argument regarding *Linn* and *Austin* and chose to frame an argument here on traditional preemption grounds grounded in *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236 (1959). Because the Unions failed to cross-appeal the denial of their preemption arguments by the trial court, there is absolutely no issue of preemption in this case. *See* 16a. Any suggestion that the Doctrine of Federal Preemption prohibits a state court from considering libel claims has been waived.

The Respondents' argument at Opposition page 8 that the *Linn* libel standard does not apply because the facts in *Linn* can be differentiated from the facts in the instant case, is clearly not the basis for this Court's Decision in *Linn*. The Court held in *Linn*:

> [T]he standards enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964) are adopted by analogy ... *We apply the malice test to effectuate the statutory design with respect to pre-emption.* Construing the Act to permit recovery of damage in a state cause of action only for defamatory statements published with knowledge of falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion of free discussion envisioned by the Act.

Linn, 383 U.S. at 65 (emphasis added).

The test from the *Lowe* Decision *supra* at n. 1, paraphrased this quote from *Linn* and applied it to both injunctive relief as well as damages, since the Illinois tort of trade libel contemplates injunctive relief in a proper case involving tortious conduct by a labor union. Given the adoption of the *New York Times* standard in *Linn*, there

is simply no merit to the Unions' argument that the Petition: "asks this Court to improperly inject itself into the merits of the controversy and judge the Union's objectives by interpreting the language of its picket signs and the meaning of its 'on strike for recognition' message." Opposition at 9.

II. THE PETITIONER PRESENTED CLEAR EVIDENCE THAT USE OF "ON STRIKE" LANGUAGE ON A PICKET SIGN COUPLED WITH OTHER STATEMENTS AT THE PICKET LINE KNOWN TO BE FALSE OR PUBLISHED WITH RECKLESS DISREGARD FOR THE TRUTH VIOLATES THE COURT'S INSTRUCTIONS IN *LINN*

The question before the circuit court and the appellate court below was whether the words "On Strike" contained on a picket sign coupled with other statements known to be false, such as "that the plant's (Geske's) broke down" (*See* Reply *infra*, footnote 5) when they knew the contrary to be true, met the *New York Times-Linn-Lowe* standard of malicious libel. The Court will note that Geske in its closing oral argument at trial, contrary to the unions' claims, based its claim upon *Lowe*, *Linn*, and the *New York Times* standard for injunctive relief interchangeably.

We respectfully suggest that the Union with malice aforethought knew that there was no "strike" going on at Geske as was represented on the picket signs. Demonstrated by testimony from the business agent who was at the picket line, Mr. Quigley, *i.e.*, whether he had ever been "on strike" while he was a construction employee, he knew what the term "on strike" meant in common parlance.[2] His

---

[2] "Q. Mr. Quigley, have you ever been on strike?
A. Have I ever been on strike?
Q. Right.
A. Yeah.
Q. And when was that?
A. For -- I was -- are you talking about for -- with a company?
(continued...)

affirmative answer showed that he understood "on strike" to mean actions of employees against their own employer, and Geske urged the trial court to conclude that this demonstrated knowledge attributable to the Union.

In the instant case, the Unions knew that not a single employee of Geske was on strike. Their picketing was top-down recognitional picketing arguably condoned for a reasonable period not to exceed 30 days.[3] There was no organizational activity where employees of Geske joined in the picket line or voted to go on strike justifying the use of the term, "On Strike" on the sign.

---

[2](...continued)

Q. Right.
A. Oh, yeah, yeah, yeah. I think it was -- I want to say around '87, I think, where a contract had expired and I was involved in a strike with a company.
Q. And do you remember if there was any picket sign.
A. Was there what?
Q. Was there any picket sign at that time?
A. I think there was picket vest, if I remember.
Q. Pardon.
A. Picket vests.
Q. Picket vests. Do you remember what they said?
A. "On strike."

Tr. at 1110, ll. 14 - 24; 1111, ll. 1-11 (Sept. 26, 1991).

[3]The Labor Act, 29 U.S.C. § 158(b)(7)(C), from which the Union derives its claim to engage in 30 days of lawful picketing, likewise only condones truthful picketing, but provides no remedy for untruthful picketing. Petitioner urges remediation against the untruth can only be heard in the state courts.

> "Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of *truthfully* advising the public (including consumers)..." (Emphasis added).

The N.L.R.B.'s decision in *Bill Johnson's Restaurants*, 290 N.L.R.B. 29 (1988), following remand from this Court's decision in *Bill Johnson's Restaurants*, 461 U.S. 731 (1983), explicitly holds that the Board will not entertain libel and will leave those issues to the state court: "Our expertise lies in resolving labor law questions that arise under the Act, rather than deciding claims that arise under state law." *Bill Johnson's*, 290 N.L.R.B. at 32.

III. PETITIONER DID NOT WAIVE OR FAIL TO URGE UPON THE TRIAL COURT THE *LINN v. PLANT GUARD WORKERS* STANDARD OF LAW

Respondents attempt to defeat the Petition on jurisdictional grounds claiming that the Company waived its argument in not articulating the *Linn v. Plant Guard Workers* standard at the trial court in support of its injunction petition, and opposing the Union's Motion for directed finding at the conclusion of the evidence on the injunction petition. The Union's arguments in this regard are simply contrary to the record. Petitioner, in its Petition, page 12, Footnote 7, has already called the Court's attention to references in the Plaintiff's Motion for Temporary Restraining Order and Preliminary and Permanent Injunction where Geske urged the *Lowe-Linn* standard. Respondents do not dispute this footnote. *See* page 7 of the Respondents' Opposition.

In the Oral Argument on September 27, 1991, before Judge Sullivan, the presiding Judge in the Circuit Court for the Nineteenth Judicial District, McHenry County, counsel for Geske argued in opposition to the Union's Motion for Directed Finding and on numerous occasions during that argument, made clear that Geske was urging the court to follow the *Linn-Lowe-New York Times* standard of reckless disregard of the truth and urged alternatively that it could meet the standard urged by the Union ultimately adopted by the court to be the standard. By Mr. Smetana:

> "We submit similarly here you have the authority to enjoin the untruthfulness on the sign. In fact, in the *Lowe* case that was the whole *raison d'etre* of the case.
>
> Mr. Pierson [counsel for the Union] made a very impassioned and persuasive argument ... that *Lowe* would be the first case in which a state court would enjoin picketing having an untrue act because the untrue act was on the picket signs and in all the other cases that had come up until that point, the untrue acts were uttered in some other fashion.

> ... the *Lowe* Court (Decision), which this Court is bound by, in fact, said that wasn't a problem. The normal tests of whether or not the utterance meets the *New York Times* standard of acting in reckless disregard of the truth ... in a labor case involving libel -- slander --... in fact the trade libel count in *Lowe* is identical to the trade libel count we have in this Complaint.
>
> The Court, in the very last paragraph of the *Lowe* decision, which we pointed out to your Honor, I believe, in the last motion to dismiss -- ... I'm paraphrasing -- the Court there said that the essence of the decision is not so much the untruth but whether it's in reckless disregard of what they know to be otherwise."

Tr. at 1332, ll. 10-21; 1333, ll. 1-2, 5-18 (Sept. 27, 1991).

Geske further argued to the specific facts in the *Lowe* case where the appellate court described the issue of reckless disregard with respect to knowledge attributable to the Union on prevailing wage rates.

> "Here they [Respondent Local 150, also the Union involved in *Lowe*] know better. They are presumed to know. They are one of the most sophisticated, able, aggressive, active labor organizations in Chicagoland and, for all I know, in the country. ...
>
> Now, why have they been using those signs? Because the "area standard" signs aren't effective. ...
>
> But that doesn't permit you, because you have a right to engage in an activity, to engage in it untruthfully. It is the same in *Lowe* and here. We've submitted that memorandum that the common understanding... they're contrary to what "strike" means. It's common concerted action by men working for an employer striking against that employer.

> Now the unions deliberately in bold letters in this case put "on strike" on this sign. Why? Because they knew ... the responsibilities of what [it is] working men should do and must do is honor a strike and do not cross a picket line when men are on strike. That's what you don't do, and that's why, when they see a strike sign in-bold letters -- that's why people don't cross.
>
> In this case the unions have a right to get a signal effect, but they can't do it untruthfully. ...
>
> Jack Pease testified -- and he's the only testimony on the record -- that prior to 1990, when they used the "area standard" signs", he was loaded at the pits. ... Now, with one exception, I think, he mentioned that since the "on strike" signs have been used, he doesn't get loaded and everyone honors the sign."

Tr. at 1334, ll. 8-12, 21-23; 1335, lines 7-24; 1336, ll. 1-2, 9-11, 17-24 (Sept. 27, 1991).

Geske was permitted sur rebuttal in oral argument and in the sur rebuttal, made specific references to the *Linn* case at Tr. at 1355, ll. 20-24; 1356, ll. 1-2 (Sept. 27, 1991):

> "The U.S. Supreme Court in the *Linn* case makes it very clear ... that if they're intentional torts, the State Court has jurisdiction. The fact that there may be other remedies available under the Labor Act for other purposes isn't dispositive. ..."

It should be clear that the *Linn-New York Times* standard adopted by the Second District in *Lowe* was clearly not waived. Geske argued for the first time at the appellate court only with

respect to the Court's *Austin* case requiring a single national libel standard articulated in *Linn* as it was not previously an issue.[4]

IV. RESPONDENTS' CLAIMS OF MISSTATEMENT IN THE PETITION ARE ERRONEOUS

Respondents' first reference to misstatements is at Page 4 of the Opposition where they claim the Petitioner was involved in litigation efforts to "stop the Union's picketing." Petitioner's complaint and injunction petition only sought relief limited to the sign's untruthful "on strike" language and not to enjoin picketing per se. *Also see* opening statement in oral argument at Page 5, *supra*. The picketing could have continued without utilizing the words, "On Strike".

The second claim of misstatement in the Opposition wrongly suggests that the record does not support statements in the Petition that union representatives declared Geske's employees were on strike, pretended that they themselves were company employees (Opposition page 4), or claimed it represented Geske employees and that they were striking (Opposition page 5). The record testimony shows that the responsible *Union business agents* at the picket line with reckless disregard for the truth *held themselves out as employees* of the Employer at the site on strike, when they knew that no Geske employee was in fact on strike.[5]

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[4]It should be noted that N.L.R.B. Chairman Stephens in his concurring opinion in *Bill Johnson's* recognizes the mandate for a single federal standard after *Austin*:

> " ...the Court set out a Federal standard for determining whether a particular libel could be found to be actionable... A state court that substitutes state common law principles for that standard and permits a state law remedy for speech that would be protected under Federal law is properly reversed."

Bill Johnson's, 290 N.L.R.B. at 34, citing *Letter Carriers v. Austin*, 418 U.S. 264, 281-87 (1974).

[5]This is based upon the unrebutted record evidence before Judge Sullivan, examination of Jack Pe[illegible]e by Mr. Smetana:

(continued...)

CONCLUSION

The two issues presented by this Petition remain unanswered in the Respondent's Brief in Response. For these reasons, it is respectfully moved that a Writ of Certiorari be granted, because of the important questions presented and because of the conflict in the state courts, amplifying that importance. [6]

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[5](...continued)

"Q. What did you observe? ...

A. They (the picketers and Business Agents) were standing in the roadway approximately 5 to 7 feet apart forming an impervious band for vehicular traffic...

Q. Did the Performance Paving truck turn around or go into the plant?

A. Performance Paving made a U-turn after a couple of comments were made to them and left the site without getting loaded...

Q. What did Mr. August (the Local 150 Business Agent) say?

A. That the Geske employees were on strike. First, someone else said that the plant's broke down and Chuck August said, "Geske employees are on strike, why don't you go to Curran [a competitor]?"

Tr. at 150, ll. 10, 13-15, 24; 151, ll. 1-4, 10-16 (Sept. 13, 1991).

This testimony was corroborated by the testimony of Robert Bergstrom, an employee of Wicks Black Top, examination by Mr. Smetana:

Q. And did he [Chuck August] have anything to do with your stopping?

A. He held his arm up and told me to -- that they were on strike.

Q. Well, tell us now what was said in that conversation, as best you can, from beginning to end.

A. All right. He stopped us ... and he said, "We are on strike here", and we said, "Do you own the plant" and he said, "Just us operators own the plant." ..."

Tr. at 232, ll. 15-24; 233, ll. 1-2 (Sept. 23, 1991).

[6]Petitioner respectfully suggests that the overriding reason why the Court should grant review at this time is that the tort of trade libel is the only available remedy to deal with untruthful statements meeting the *New York Times* standard placed on a picket sign. If *certiorari* should be denied, the law of this case will prevent the *Linn-Lowe-New York Times* standard from being applied in view of the decision of the Second District below. The headwinds of any future case raising similar reckless disregard for the truth on picket signs by labor organizations are insurmountable in view of the NLRB General Counsel's issuance of Complaint in the instant Geske case (copy attached), which is presently *sub judice* before an

(continued...)

Respectfully submitted,

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Dated: November 16, 1993

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[6](...continued)
NLRB ALJ following an evidentiary hearing and briefs. The gravamen of the Complaint, in addition to erroneously claiming pre-emption, is a remedy that the Board fashioned in the pre-*Lechmere* decision of *Loehmann's Plaza*, 305 N.L.R.B. No. 81 (1991), requiring an employer to take appropriate action to vacate any state proceeding. In *Loehmann's* the tort was trespass. In the instant Geske Complaint, it is trade libel that arguably interferes with arguably protected rights. The Board in its post-*Lechmere* decision in *Davis Supermarkets*, 306 N.L.R.B. No. 86 (1992), has signaled its continued adherence to chilling state tort enforcement. While Geske has urged by analogy in response to the ALJ that, as in this Court's decision in *Lechmere v. NLRB*, 112 S.Ct. 843 (1991), where strangers will not be permitted to come onto private property, it is similar to the scheme of the Labor Act to only condone truthful picketing. The effect of the government's decision to issue complaints of this nature will so chill future opportunities for others to raise trade libel issues that the instant Petition will be the last to bring this issue to the Court. The Court will note that the remedy the NLRB seeks from Geske is payment of all the unions' attorneys' fees in defending this trade libel action. Supp. App. 5a. This is punitive for a tiny employer such as Geske and creates the chilling effect that we speak, *i.e.*, inhibiting others from utilizing a state court libel action in similar circumstances.

The Court's formulation of the mootness doctrine in *Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911), and more recently in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 126 (1974), is also analogous in showing the reason for granting review in the instant case. A denial of preliminary injunctive relief is a short-term order that would (forever) escape review in view of the Board's present use of its prosecutorial discretion in issuing complaint such as the one against Geske (*see* Supplemental Appendix).

SUPPLEMENTAL APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THIRTY-THREE

GESKE & SONS, INC.,

and

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
NO. 150, AFL-CIO

COMPLAINT AND NOTICE OF HEARING

It having been charged by International Union of Operating Engineers, Local 150, AFL-CIO, herein called Local 150, that Geske and Sons, Inc., herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region 33, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations--Series 8, as amended, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1.

(a) The original charge was filed by Local 150 on September 19, 1991, and was served on Respondent by certified mail on or about the same date.

(b) The first amended charge was filed by Local 150 on March 24, 1992, and was served on Respondent by certified mail on or about the same date.

2.

(a) Respondent is, and has been at all times material herein, a Delaware corporation with office and place of business located at Crystal Lake, Illinois. It is engaged in the business of asphalt paving and manufacturing of asphalt mix for sale to commercial customers in the construction industry.

(b) Respondent, during the past twelve months, derived gross revenues in excess of $250,000 from the conduct of its business operations.

(c) Respondent, during the past twelve months, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its Crystal Lake, Illinois facility, goods and materials, including oil, valued in excess of $50,000 which were transported to said facility directly from states other that the State of Illinois.

(d) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3.

(a) Operating Engineers Local 150, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

(b) Chauffeurs, Teamsters and Helpers, Local 301, hereinafter referred to as Teamsters Local 301 is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4.

At all times material herein, the following-named persons occupied the positions set opposite their respective names, and have been, and are now, agents of the Respondent at its Crystal Lake, Illinois facility, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Leroy Geske - President
Lorie Geske - General Manager

5.

(a) During the period August 19, 1991 through September 17, 1991, Operating Engineers Local 150 picketed Respondent with signs that read: "IUOE Local 150 on strike against Geske for representation as majority bargaining representative of company's operating engineer employees."

(b) During the period August 19, 1991 through September 17, 1991, Teamsters Local 301 assisted Operating Engineers in the picketing described in paragraph 5(a) above.

(c) On or about September 23, 1991, Respondent filed an unfair labor practice charge in Case 33-CP-268 against Operating Engineers Local 150 alleging a violation of Section 8(b)(7)(C) of the Act.

(d) On or about September 26, 1991, Respondent filed an unfair labor practice charge in Case 33-CP-273 against Teamsters Local 301 alleging a violation of Section 8(b)(7)(C) of the Act.

(e) On or about September 26, 1991, Respondent filed an unfair labor practice charge in Case 33-CP 274 against Operating Engineers Local 150 alleging a violation of Section 8(b)(7)(C) of the Act.

(f) On or about October 8, 1991, Glenn A. Zipp, the Regional Director of Region 33, dismissed the charges against Operating Engineers Local 150 in Cases 33-CP-268, and 33-CP-274 and dismissed the charges against Teamsters Local 301 in Case 33-CP-273. A copy of said dismissal letter is attached as Exhibit A.

(g) On or about February 25, 1992, the Office of Appeals of the National Labor Relations Board denied Respondent's appeal of the Regional Director's dismissal of Cases 33-CP-268, 33-CP-273, and 33-CP-274. A copy of said dismissal of Respondent's appeal is attached as Exhibit B.

6.

(a) On or about September 5, 1991, Respondent filed a state court lawsuit in the Circuit Court of McHenry County, Illinois, Case

No. 91 CH 273, against Operating Engineers Local 150 and Teamsters Local 301 in which it requested a temporary restraining order, preliminary and permanent injunctions and damages.

(b) On or about September 27, 1991, Respondent filed a Third Amended Verified Complaint for temporary restraining order, preliminary and permanent injunctions, and damages, and named as defendants, inter alia, International Union of Operating Engineers, Local No. 150, Chuck August, Robert Paddock, Gary Laney, Michael Quigley, Kal Lester, and Angel Delrivero, Chauffeurs, Teamsters, and Helpers, Local Union 301, Bud Layoff, and Mike Haffner. A copy of said Third Amended Verified Complaint is attached as Exhibit C.

(c) The Third Amended Complaint alleges as causes of actions against the defendants named above in paragraph 6(b) trade libel, tortious interference with contractual relations, and tortious interference with prospective advantage and seeks injunctive relief and damages.

(d) On or about October 15, 1991, Respondent filed a Notice of Appeal in the Appellate Court of Illinois, Second Judicial District, by which it appeals McHenry County Circuit Judge Sullivan's denial on September 27, 1991, of Respondent's Motion for Preliminary Injunction and since October 15, 1991 has continued to maintain and prosecute said Appeal.

(e) Since on or about September 5, 1991, Respondent has filed, maintained and prosecuted the state court lawsuit described above in paragraphs 6(a) through (d), with causes of action for trade libel, tortious interference with contractual relations and tortious interference with prospective advantage that are without reasonable basis and that were motivated by an intent to retaliate against the protected concerted activity of Operating Engineers Local 150 in seeking to organize the employer's operating engineer employees by engaging in lawful recognitional picketing.

7.

By the acts described above in paragraph 6, and by each of said acts, Respondent did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Sections 2(6) and (7) of the Act.

8.

As part of the remedy, Counsel for the General Counsel seeks to enjoin Respondent's state court lawsuit with the exception of a claim for damages against Operating Engineers Local 150 and Teamsters Local 301 under the authority of Section 303 of the National Labor Relations Act for allegedly threatening neutral employers that was tantamount to engaging in conduct with an unlawful secondary object under Section 8(b)(4) of the Act.

PLEASE TAKE NOTICE that on a date and time and at a place to be designated later, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. The hearing will continue on consecutive days thereafter until concluded. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, As Amended, is attached.

YOU ARE FURTHER NOTIFIED that pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Complaint, which must be received within 14 (fourteen) days from the date of this Complaint, and that unless it does so, all of the allegations in said Complaint shall be deemed to be admitted true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

DATED at Peoria, Illinois, this 30th day of March, 1992.

/s/ Glenn A. Zipp
Glenn A. Zipp, Regional Director
National Labor Relations Board
Region Thirty-Three
16th Floor Savings Center Tower
411 Hamilton Boulevard
Peoria, Illinois 61602

(Exhibits Omitted)